TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 325.

HENRY J. GRANGER, PLAINTIFF IN ERROR,

vs.

ALBERT L. ORDEMAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. RUDOLF, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED OCTOBER 6, 1923.

(28,329)

(23,326)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 325.

HENRY J. GRANNIS, PLAINTIFF IN ERROR,

vs.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print
Caption	1	1
Stipulation as to return to writ of error	2	1
Record from district court of the county of St. Louis, Minnesota.	3	2
Complaint	3	2
Separate answer of defendant Henry J. Grannis	7	4
Separate answer of defendant Charles K. Dickerman	15	8
Reply to separate answer of Henry J. Grannis	22	11
Reply to separate answer of Charles K. Dickerman	27	13
Supplemental complaint as to extension of time to redeem	31	16
Answer to supplemental complaint	34	17
Findings of fact and conclusions of law	36	19
Exhibit "A," attached to findings, being judgment in partition suit	61	30
Memorandum of court attached to findings	69	34
Motion for new trial	91	43
Affidavits attached to motion for new trial	93	44
Exhibit 1—Alfred Jaques	93	44
2—Albert B. Gellfuss	98	47

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 9, 1914.

	Original.	Print
Exhibit 3—Carl F. Geilfuss	101	48
4—W. H. Timlin	103	49
5—Wilson G. Crosby	107	51
Objections to hearing on motion for new trial	110	53
Affidavit of Henry J. Grannis in opposition to motion for new trial	112	54
Order denying motion for new trial	117	56
Memorandum of court attached to order denying new trial	118	57
Judgment	124	59
Notice of appeal of plaintiffs	127	61
Notice of appeal of defendants	131	63
Stipulation waiving bond on appeal	134	65
Clerk's certificate	136	65
Assignment of errors	137	66
Opinion	140	67
Petition for rehearing	150	73
Amended petition for rehearing	155	77
Opinion on petition for rehearing	166	83
Minute entry of argument	168	84
Order for judgment	170	85
Judgment	173	86
Clerk's certificate	175	87
Assignment of errors	176	88
Petition for writ of error	181	91
Order allowing writ of error	183	92
Bond on writ of error	184	92
Writ of error	186	94
Clerk's certificate of lodgment	188	95
Citation	189	96
Return to writ of error	190	96

1 17522.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

ALBERT L. ORDEAN et al., Appellants and Respondents,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants;
HENRY J. GRANNIS, Respondent.

Return.

Jaques and Hudson, John G. Williams and William Elder, Attorneys for Albert L. Ordean, et al.

Henry J. Grannis, Attorney for Charles K. Dickerman and Henry J. Grannis.

Filed Feb. 21 1912. I. A. Caswell, Clerk.

2 STATE OF MINNESOTA:

Supreme Court, April Term, 1912.

ALBERT L. ORDEAN, et al., Appellants and Respondents,
vs.
HENRY J. GRANNIS et al., Appellants; HENRY J. GRANNIS, Respondent.

Stipulation.

It is hereby stipulated and agreed by and between the counsel for the respective parties in the above entitled cause, that Clerk of said court shall make return to the Supreme Court of the United States on the writ of error, issued from that court, to review the judgment in the above entitled cause in favor of said Appellants and against said Respondent of the following papers and records and the same shall constitute the complete return upon said writ of error:—Return to State Supreme Court, Index to Return, Assignments of Error to State Court on plaintiff's appeal, Opinion of Supreme Court, Petition for Rehearing, Amended petition for rehearing, Opinion denying petition for rehearing, Judgment Roll, Assignment of errors filed on petition for writ of error, Petition for writ of Error, Order allowing writ of error, Bond on writ of error and approval, Writ of Error (original), Certificate of Lodgment and Citation (original).

Dated July 26th, 1912.

H. J. GRANNIS,
Attorney for Respondent, Henry J. Grannis.
JAQUES & HUDSON,
JOHN G. WILLIAMS,
WM. ELDER,
Attorneys for Albert L. Ordean et al., Appellants.

[Endorsed:] 17552. State of Minnesota, Supreme Court, April Term, 1912. Albert L. Ordean et al., Appellants & Respondent, vs. Henry J. Grannis et al., Appellants; Henry J. Grannis, Respondent. Stipulation as to Return. Filed Jul- 29, 1912. I. A. Caswell, Clerk.

2½ 17552.

STATE OF MINNESOTA:

Supreme Court, April Term, 1912.

ALBERT L. ORDEAN et al., Appellants & Respondents,
vs.
HENRY J. GRANNIS et al., Appellants; HENRY J. GRANNIS, Respondent.

Stipulation as to Return.

Filed Jul- 29, 1912. I. A. Caswell, Clerk.

3 STATE OF MINNESOTA:

In the Supreme Court, April Term, A. D. 1912.

District Court, Eleventh Judicial District.

STATE OF MINNESOTA:
County of St. Louis:

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Paper Book.

Complaint.

Now come the plaintiffs, and for a cause of action against the defendants allege:

4 1.

That Alice E. Buchart is executor and trustee of the last will and testament of Ida Michaud, deceased.

2.

That the Oliver Iron Mining Company is a corporation duly organized under the laws of the State of Minnesota.

3.

That the plaintiffs other than the Oliver Iron Mining Company are the owners in fee simple of the following described real estate situate in the County of St. Louis and State of Minnesota, to-wit: Lot two (2) or the Northwest quarter of Northeast quarter (N. W. ¼ of N. E. ¼) of Section four (4), Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian;

That said plaintiffs own said premises in the following proportions, to-wit: Albert L. Ordean an undivided 19/100 thereof; Margaret Sullivan an undivided 1/15 thereof; Alfred Jaques an undivided 1/30 thereof; Theodore T. Hudson an undivided 1/30 thereof; John G. Williams an undivided 1/40 thereof; Alice E. Butchart, as executor and trustee under the will of Ida Michaud, deceased, an undivided 7/200 thereof; Christiana Alstead an undivided
5 7/60 thereof; Frank Woodman an undivided ½ thereof.

4.

That plaintiff, the Oliver Iron Mining Company, is the owner and holder of a mining lease upon said premises dated November 8, 1902, and recorded December 31, 1902, at 9:30 o'clock A. M. in the office of the Register of Deeds in and for St. Louis County, Minnesota, in Book X of Agreements, at page 422, which lease is for a term of fifty years from October 1, 1902, and covers the whole of the above described premises, and entitles the said Oliver Iron Mining Company to explore for, mine and remove from said premises the merchantable iron ore and other minerals with the right to cut and use all the timber other than pine, necessary for fuel and buildings, and for drains, tramways, supports and for shafts in mines or connecting the same with any railway, said Oliver Iron Mining Company to pay a royalty on iron ore of twenty-five cents per gross ton, said lease containing other provisions and conditions ordinary and usual in a mining lease. For greater certainty reference is hereby made to the record of said mining lease.

5.

That said premises are vacant and unoccupied.

6 6.

That defendants, and each of them, claim to have some right and title to, interest in or lien upon said premises adverse to the plaintiffs, but plaintiffs allege that neither of the defendants have any right to, interest in or lien upon said premises, or any part thereof.

Wherefore, Plaintiffs ask that they may have judgment against the defendants adjudging and decreeing that the plaintiffs other than the Oliver Iron Mining Company are the owners of the premises hereinbefore described in the proportions hereinbefore alleged and set forth; subject, however, to the above described mining lease

of the plaintiff Oliver Iron Mining Company, and that the defendants have no right to, interest in or lien upon said premises, or any part thereof, and that the defendants be forever barred and enjoined from making any claim to said premises, or any part thereof, and plaintiffs further ask that they may have such other and further relief as to the court may seem equitable and just, and that they may have judgment for their costs and disbursements herein.

JAQUES & HUDSON,
Attorneys for Plaintiffs.

(Duly verified.)

Filed in my office at — o'clock — m. Apr. 19, 1910.
J. P. JOHNSON, *Clk. Dist. Court.*
By R. E. JOHNSON.

STATE OF MINNESOTA:
County of St. Louis, ss:

District Court, Eleventh Judicial District.

7

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Separate Answer of Defendant Henry J. Grannis.

The above named defendant, Henry J. Grannis, makes this his separate answer to the complaint of the plaintiffs:

1. This defendant denies each and every allegation in said complaint contained, except as hereinafter admitted, or otherwise denied or stated.

2. This defendant denies any knowledge or information sufficient to form a belief as to whether Alice E. Butchart is executor and trustee of the last will and test-ment of Ida Michaud, deceased. This defendant also denies any knowledge or information sufficient to form a belief as to what, if any, mining lease the plaintiffs, other

8

than the Oliver Iron Mining Company, or parties under whom they claim, may have given to said Company, but this defendant denies that he himself or any parties under whom he claims have given any mining lease to said Oliver Iron Mining Company and alleges that any mining lease purporting to cover said lands which said Company may have is subject and subordinate to the defendants rights, title, interest and lien hereinafter set forth.

3. This defendant admits that the premises described in the complaint are vacant and un-occupied.

4. This defendant admits that he claims and alleges that he has

a title to an interest and rights in and a lien upon the lands described in the complaint and all thereof and that the nature of such title, interest, rights and lien is as hereinafter set forth.

5. For his further answer to said complaint and also as a counterclaim, this defendant alleges that he has a lien upon an undivided one-fifth (1/5) interest in and to the lands, described in the complaint and title to, an interest and rights in said undivided one-fifth (1/5) interest, by virtue of the following facts: That on the 9th day of February, 1900, and for sometime prior and also subsequent to said date, one George A. Elder, was the owner in fee simple
9 of an undivided one-fifth (1/5) interest in and to the lands described in said complaint, to-wit: Lot two (2), or the Northwest quarter of the Northeast quarter (N. W. ¼ of N. E. ¼), of Section four (4), in Township fifty-eight (58) North, Range seventeen (17) West of the Fourth Principal Meridian, in St. Louis County, Minnesota. That in an action pending in the District Court of St. Louis County, Minnesota, wherein one Charles E. Dickerman was plaintiff and the Syndicate Investment Company, The American Loan and Trust Company, John McKinley, George A. Elder and William McKinley, were defendants, a judgment was, on the 9th day of February, 1900, duly and regularly rendered and entered in and by said Court and on said day docketed in the office of the Clerk of said Court in favor of said Charles E. Dickerman and against said The Syndicate Investment Company, The American Loan and Trust Company, George A. Elder and William McKinley, and each of them for the sum of twenty-three thousand ninety-five and 34/100 ($23,095.34) dollars, which judgment thereupon became a valid and subsisting lien upon said undivided one-fifth (1/5) interest in and to the lands hereinbefore and in said complaint described, owned by said George A. Elder, for the full amount of said judgment, to-wit: Twenty-three thousand ninety-five and 34/100 ($23,095.34) dollars and interest from the said 9th day of February, 1900. That thereafter and prior to October
10 4th, 1906, said Charles E. Dickerman died intestate and was, at the time of his death, a resident of the County of Ramsey, State of Minnesota; that his estate was duly probated in the Probate Court of said Ramsey County and such proceedings were had, in that court, that on the 4th day of October, 1906, a final decree was duly and regularly entered therein assigning to and vesting in Walter H. Dickerman, Arthur E. Dickerman, Gilbert G. Dickerman, Charles K. Dickerman and Louise D. Fraker, children and heirs at law of said deceased, all of the real and personal property of which said Charles E. Dickerman, died seised, including said judgment, in the proportions of an undivided one-fifth (1/5) to each. That thereafter and on or about the 2nd day of July, 1907, the said Probate Court of Ramsey County, Minnesota, duly appointed the Security Trust Company of St. Paul, Minnesota, guardian of the person and estate of said Arthur E. Dickerman and said Security Trust Company has ever since acted and is now acting as such guardian. That a duly certified transcript of said final decree of said Probate Court of Ramsey County, in the matter of the estate

of said Charles E. Dickerman and a duly certified copy of the letters of guardianship appointing said Security Trust Company, guardian of said Arthur E. Dickerman, as aforesaid, were duly filed in the office of the Clerk of said District Court of St. Louis County, Minnesota. That on or about the 21st day of December, 1909,
11 said Walter H. Dickerman, Louise D. Fraker, Gilbert G. Dickerman, Charles K. Dickerman and Arthur E. Dickerman, by his guardian, as aforesaid, for a valuable consideration, duly assigned said judgment, by an instrument, in writing, duly executed, witnessed and acknowledged, to said defendants, Henry J. Grannis and Charles K. Dickerman. That said assignment was executed by said Gilbert G. Dickerman, by his attorney in fact, James S. Lynn, thereunto duly authorized, by a power of attorney on file in the office of the Clerk of said District Court and said assignment of said judgment was duly filed, in the office of the Clerk of said District Court, on the 27th day of December, 1909. That thereafter and on said 27th day of December, 1909, an execution was duly issued out of and under the seal of said District Court, by authority, of said Henry J. Grannis and Charles K. Dickerman, as assignees of said judgment, as aforesaid, directed to the Sheriff of said County of St. Louis. That under and by virtue of said execution said Sheriff of said County of St. Louis, duly levied upon the lands and real estate, hereinbefore and in said complaint particularly described and certain other lands, as the property of said judgment debtor, George A. Elder, and thereafter and on the 8th day of February, 1910, upon due and legal notice, said Sheriff duly sold all of the right, title and interest that said judgment debtor, George A. Elder, had in and to said lands, so levied upon, on the
9th day of February, 1900, the date of the rendition of said
12 judgment and any interest therein which said judgment debtor, George A. Elder may have since that date acquired. That at said sale, said lands described in the complaint were sold for the sum of fifteen thousand ($15,000.00) dollars, to said defendants Henry J. Grannis and Charles K. Dickerman, and said Sheriff did thereupon and on said 8th day of February, 1910, duly execute and deliver to said defendants, his certificate of said sale, in due and legal form, an the same was, on the 8th day of February, 1910, at 10:30 o'clock A. M. duly recorded, in the office of the Register of Deeds of said County of St. Louis, in Book 329 of Deeds, Page 193. That no redemption has been made, from said execution sale of said land, sold at said sale as aforesaid, and said defendants are the owners and holders of said Sheriff's certificate and of all rights, interests, lien and title acquired thereby and thereunder and this defendant, Henry J. Grannis, is the owner and holder of an undivided one-half (½) interest in and to the aforesaid title, rights, interest and lien so acquired in, to and upon the lands sold as aforesaid, and the certificate of said sale and all monies which may be paid in redemption of said land, from said execution sale and in case no redemption is made from said sale, this defendant, by virtue thereof will become and be the owner in fee simple of an undivided

one-tenth (1/10) of the lands hereinbefore described, sold at
13 said execution sale and included in said Sheriff's certificate of sale, free and clear of any right and title to, interest in or lien upon the same by the plaintiffs in this action, or any of them.

6. For his further answer and counter-claim herein, this defendant alleges, that, in addition to and independent of the rights, title, interest and lien acquired in and to the aforesaid lands, under and by virtue of the aforesaid judgment and of the said execution sale thereunder, this defendant is the owner in fee simple of an undivided one-fifth (1/5) of the lands described in the complaint and all thereof and that the plaintiffs have not nor have any of them any right or title to, interest in or lien upon the aforesaid undivided one-fifth (1/5) interest in said lands owned by this defendant.

Wherefore, this defendant demands judgment:

1. That he is the owner of an undivided one-half (½) interest in and to the aforesaid Sheriff's certificate upon execution sale and all rights and title to, interest in and lien upon said lands by virtue of said judgment and sale, including one-half (½) of any money paid in redemption of said lands from said sale.

2. That this defendant is the owner in fee simple of an
14 undivided one-tenth (1/10) interest in and to said lands, sold upon said execution sale, as aforesaid, if the same shall not be redeemed from said execution sale, within the time required by law, free from any estate or interest in or lien thereon, by the plaintiffs, or any of them.

3. That in addition to and independent of the rights, title, interest and lien acquired under and by virtue of said execution sale, this defendant is the owner in fee simple of an undivided one-fifth (1/5) of the lands described in the complaint and all thereof, free from any title to, estate or interest therein or lien thereon by or on behalf of the plaintiffs, or any of them.

4. For such other and further relief as may be proper, besides the costs and disbursements of this action.

HENRY J. GRANNIS,
Attorney Pro Se.

(Duly verified.)

Due and personal service of the within separate answer by copy at Duluth, Minn., this 7th day of May, 1910, is hereby admitted.

JAQUES & HUDSON,
Attorneys for Plaintiff.

Filed in my office at — o'clock — m., May 12, 1910.

J. P. JOHNSON, *Clk Dist. Court.*
By B. G. RILLING, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Separate Answer of Defendant, Charles K. Dickerman.

The above named defendant, Charles K. Dickerman, makes this his separate answer to the complaint of the plaintiffs:

1. This defendant denies each and every allegation in said complaint contained, except as hereinafter admitted, or otherwise denied or stated.

2. This defendant denies any knowledge or information sufficient to form a belief as to whether Alice E. Butchart is executor and trustee of the last will and testament of Ida Michaud, deceased. This defendant also denies any knowledge or information sufficient to form a belief as to whether the plaintiff, Oliver Iron Mining Company, has a mining lease upon the lands described in the complaint, but defendant alleges that any mining lease purporting to cover said lands, which said Company may have is subject and subordinate to the defendant's rights, title, interest and lien hereinafter set forth.

3. This defendant admits that the premises described in the complaint are vacant and un-occupied.

4. This defendant admits that he claims and alleges that he has a title to an interest and rights in and lien upon the lands described in the complaint and all thereof and that the nature of such title, interest, rights and lien is as hereinafter set forth.

5. For his further answer to said complaint and also as a counterclaim, this defendant alleges that he has a lien upon an undivided one-fifth (1/5) interest in and to the lands, described in the complaint and title to, an interest and rights in said undivided one-fifth (1/5) interest, by virtue of the following facts: That on the 9th day of February, 1900, and for some time prior and also subsequent to said date, one George A. Elder, was the owner in fee simple of an undivided one-fifth (1/5) interest in and to the lands described in said complaint, to-wit: Lot two (2), or the Northwest quarter of the Northeast quarter (N. W. ¼ of N. E. ¼), of Section four (4), in Township fifty-eight (58) North, Range seventeen (17) West of the Fourth Principal Meridian, in St. Louis County, Minnesota. That, in an action pending in the District Court of St. Louis County, Minnesota, wherein one Charles E. Dickerman was plaintiff and The Syndicate Investment Company, The American

Loan and Trust Company, John McKinley, George A. Elder and William McKinley, were defendants, a judgment was, on the 9th day of February, 1900, duly and regularly rendered and entered in and by said Court and on said day docketed in the office of the Clerk of said Court, in favor of said Charles E. Dickerman and against said The Syndicate Investment Company, The American Loan and Trust Company, George A. Elder and William McKinley, and each of them for the sum of twenty-three thousand nine-five and 34/100 ($23,095.34) dollars, which judgment thereupon became a valid and subsisting lien upon said undivided one-fifth (1/5) interest in and to the lands hereinbefore and in said complaint described, owned by said George A. Elder, for the full amount of said judgment, to-wit: Twenty-three thousand ninety-five and 34/100 ($23,095.34) dollars and interest from the said 9th day of February, 1900. That thereafter and prior to October 4th, 1906, said Charles E. Dickerman died intestate and was, at the time of his death, a resident of the County of Ramsey, State of Minnesota; that his estate was duly probated in the Probate Court of said Ramsey County and such proceedings were had, in that court, that on the 4th day of October, 1906, a final decree was duly and regularly entered therein assigning
18 to and vesting in Walter H. Dickerman, Arthur E. Dickerman Gilbert G. Dickerman, Charles K. Dickerman and Louise D. Fraker, children and heirs at law of said deceased, all of the real and personal property of which said Charles E. Dickerman, died seized, including said judgment, in the proportions of an undivided one-fifth (1/5) to each. That thereafter and on or about the 2nd day of July, 1907, the said Probate Court of Ramsey County, Minnesota, duly appointed the Security Trust Company of St. Paul, Minnesota, guardian of the person and estate of said Arthur E. Dickerman and said Security Trust Company has ever since acted and is now acting as such guardian. That a duly certified transcript of said final decree of said Probate Court of Ramsey County, in the matter of the estate of said Charles E. Dickerman and a duly certified copy of the letters of guardianship appointing said Security Trust Company, guardian of said Arthur E. Dickerman, as aforesaid, were duly filed in the office of the Clerk of said District Court of St. Louis County. That on or about the 21st day of December, 1909, said Walter H. Dickerman, Louise D. Fraker, Gilbert G. Dickerman, Charles K. Dickerman and Arthur E. Dickerman, by his guardian, as aforesaid, for a valuable consideration, duly assigned said judgment, by an instrument, in writing, duly executed, witnessed and acknowledged, to said defendants, Henry J. Grannis and Charles K. Dickerman. That said assignment was executed by said Gilbert G. Dicker-
19 man, by his attorney in fact, James S. Lynn, thereunto duly authorized, by a power of attorney on file in the office of the Clerk of said District Court and said assignment of said judgment was duly filed, in the office of the Clerk of said District Court, on the 27th day of December, 1909. That thereafter and on said 27th day of December, 1909, an execution was duly issued out of and under the seal of said District Court, by authority, of said Henry J. Grannis and Charles K. Dickerman, as assignee of said judgment, as afore-

said, directed to the Sheriff of said County of St. Louis. That under and by virtue of said execution said Sheriff of said County of St. Louis, duly levied upon the lands and real estate, hereinbefore and in said complaint particularly described and certain other lands, as the property of said judgment debtor, George A. Elder, and thereafter and on the 8th day of February, 1910, upon due and legal notice, said Sheriff duly sold all of the right, title and interest that said judgment debtor, George A. Elder, had in and to said lands, so levied upon, on the 9th day of February, 1900, the date of the rendition of said judgment and any interest therein which said judgment debtor, George A. Elder may have since that date acquired. That at said sale, said lands described in the complaint were sold for the sum of fifteen thousand ($15,000.00) dollars, to said defendants Henry J. Grannis and Charles K. Dickerman, and said Sheriff did thereupon and on said 8th day of February, 1910, duly execute and
20 deliver to said defendants, his certificate of said sale, in due and legal form, and the same was, on the 8th day of February, 1910, at 10:30 o'clock A. M. duly recorded, in the office of the Register of Deeds of said County of St. Louis, in Book 329 of Deeds, Page 193. That no redemption has been made, from said execution sale of said land, sold at said sale as aforesaid, and said defendants are the owners and holders of said Sheriff's certificate and of all rights, interests, lien and title acquired thereby and thereunder and this defendant, Charles K. Dickerman, is the owner and holder of an undivided one-half (½) interest in and to the aforesaid title, rights, interest and lien so acquired in, to and upon the lands sold as aforesaid, and the certificate of said sale and all monies which may be paid in redemption of said land from said execution sale and in case no redemption is made from said sale this defendant, by virtue thereof, will become and be the owner in fee simple of an undivided one-tenth (1/10) of the lands, hereinbefore described, sold at said execution sale and included in said Sheriff's certificate of sale, free and clear of any right and title to, interest in or lien upon the same by the plaintiffs in this action, or any of them.

Wherefore, this defendant demands judgment:

1. That he is owner of an undivided one-half (½) in-
21 terest in and to the aforesaid Sheriff's certificate upon execution sale and all rights and title to, interest in and lien upon said lands, by virtue of said judgment and sale, including one-half (1½) of any money paid in redemption of said lands from said sale.

2. That this defendant is the owner in fee simple of an undivided one-tenth (1/10) interest in and to said lands, sold upon said execution sale, as aforesaid, if the same shall not be redeemed from said execution sale, within the time required by law, free from any estate or interest in or lien thereon, by the plaintiffs, or any of them.

3. For such other and further relief as may be proper, besides the costs and disbursements of this action.

H. J. GRANNIS,
Attorney for Defendant, Charles K. Dickerman.

(Duly verified.)

Due and personal service of the within separate answer by copy at Duluth, Minn., this 7th day of May, 1910, is hereby admitted.

JAQUES & HUDSON,
Attorneys for Plaintiff.

Filed in my office at — o'clock, — —., May 12, 1910
J. P. JOHNSON, *Cl'k Dis't Court.*
By B. G. RILLING, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE
22 E. BUTCHART, as Administrator and Trustee under the last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS AND CHARLES K. DICKERMAN, Defendants.

Now come the plaintiffs, and for a reply to the separate answer of the defendant Henry J. Grannis herein say:

First. That as to the allegations contained in the second, fourth and sixth paragraphs of said answer, plaintiffs deny all of the allegations in said paragraphs contained, and each and every part thereof.

Second. That as to the fifth paragraph of said answer, plaintiffs deny each and every allegation therein contained, and each and every part thereof not hereinafter admitted, qualified or explained.

Plaintiffs admit that on the 9th day of February, 1900, for some time prior and also subsequent to said date, one George A. Elder was the owner in fee simple of an undivided one-fifth (1/5) interest in and to the lands described in the complaint herein, and in the answer of the defendants herein.

Plaintiffs admit that in an action pending in the District
23 Court of St. Louis County, Minnesota, wherein one Charles E. Dickerman was plaintiff and the Syndicate Investment Company, the American Loan & Trust Company, John McKinley, George A. Elder and William McKinley were defendants, judgment was on the 9th day of February, 1900, duly and regularly rendered and entered in and by said court, and on said day docketed in the office of the clerk of said court in favor of Charles E. Dickerman and against said Syndicate Investment Company, American Loan & Trust Company, George A. Elder and Willim McKinley, and each of them, for the amount set forth in the answer of the defendant herein, and plaintiffs admit that said judgment became a lien upon the undivided one-fifth (1/5) interest of said George A. Elder in the real estate in the complaint and answer herein described, but allege that the lien of said judgment was subject to a large number of judgments theretofore entered and docketed against

said George A. Elder in the District Court of St. Louis County, Minnesota.

Plaintiffs admit that there purports to have been a sale of the lands in the complaint and answer herein described made by the Sheriff of St. Louis County, Minnesota, upon an execution issued upon the said judgment of February 9th, 1900, hereinbefore mentioned, to the defendants herein, but deny that they have any knowledge or information sufficient to form a belief as to whether the other allegations in said paragraph five contained are true or not.

And for further defense to and in avoidance of the matters and facts set up in the answer of said defendant, plaintiffs allege:

1.

That on or about the 8th day of November, 1895, one George A. Elder being then the owner of an undivided interest in and to the lands described in the complaint and answer herein, commenced an action in partition in the District Court of St. Louis County, Minnesota, against the Mesaba Land Company, Charles E. Dickerman, and other persons owning an interest in said premises, including all of the judgment creditors of said George A. Elder as well as the above named Charles E. Dickerman; that said action involved the matter of partitioning the lands described in the complaint and answer herein; that all of the persons interested in said land, whether as judgment creditors or as owners, were made parties to said action, and duly served with the summons therein, including the above mentioned Charles E. Dickerman.

That at the time of the commencement of said action in partition, notice of Lis Pendens was duly filed in the office of the Register of Deeds in and for St. Louis County, Minnesota, for the purpose of partitioning the premises described in the answer and complaint herein, and that judgment would be entered in said action partitioning said premises, or ordering that the same should be sold, and the proceeds of the sale thereof be divided among persons claiming an interest therein in case a partition of the premises was not practicable.

That on the 5th day of May, 1899, a judgment of partition was entered in said action adjudging and decreeing that said land could not be divided and partitioned, and ordering and decreeing that said land should be sold by referee to the highest bidder, and the proceeds thereof distributed among the defendants in said action, according to their respective rights under the law, and also appointing a referee to make a sale of the tract of land involved in said action; that the referee so appointed duly qualified as such referee, and thereafter said land was sold by said referee to the highest bidder in accordance with and pursuant to the said decree of partition, in the manner provided by law for sale of real estate under decrees of the court; that a notice of said sale was given as required by law and by said decrees and that said land was sold at public auction to the highest bidder, as required by said decree and the law.

That said sale as thereafter duly confirmed by order of said court, and said referee was directed and ordered by said court to make deeds to said purchaser at said sale, and that such referee thereafter executed and delivered to said purchaser a good and sufficient
26 deed conveying title to such highest bidder to said land; that subsequently plaintiffs other than the Oliver Iron Mining Company, became the owners in fee simple of said land by mesne conveyance of said real estate executed by said highest bidder, and his grantees, and of all of said land, and that the plaintiffs are now the owners thereof, and that the plaintiff Oliver Iron Mining Company, subsequently secured a mining lease of said premises from the other plaintiffs herein.

Wherefore, plaintiffs ask that they may have judgment as hereinbefore demanded.

JAQUES & HUDSON,
Attorneys for Plaintiffs.

(Duly verified.)

Due service admitted this 17th day of June, 1910.

H. J. GRANNIS,
Attorney for Plaintiff.

Filed in my office at — o'clock — m.

J. P. JOHNSON, *Clk. Dist. Court,*
By R. E. JOHNSON, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

27 Now come the plaintiffs, and for a reply to the separate answer of the defendant Charles K. Dickerman herein, says:

First. That as to the allegations contained in the second and fourth paragraphs of said answer, plaintiffs deny all of the allegations in said paragraphs contained, and each and every part thereof.

Second. That as to the fifth paragraph of said answer, plaintiffs deny each and every allegation therein contained, and each and every part thereof not hereinafter admitted, qualified or explained.

Plaintiffs admit that on the 9th day of February, 1900, for some time prior and also subsequent to said date, one George A. Elder was the owner in fee simple of an undivided one-fifth (1/5) interest

in and to the lands described in the complaint herein, and in the answer of the defendants herein.

Plaintiffs admit that in an action pending in the District Court of St. Louis County, Minnesota, wherein one Charles E. Dickerman was plaintiff and the Syndicate Investment Company, the American Loan & Trust Company, John McKinley, George A. Elder and William McKinley were defendants, judgment was on the 9th day of February, 1900, duly and regularly rendered and entered in and by said court, and on said day docketed in the office of the clerk
28 of said court in favor of Charles E. Dickerman and against said Syndicate Investment Company, American Loan & Trust Company, George A. Elder and William McKinley, and each of them, for the amount set forth in the answer of the defendant herein, and plaintiffs admit that said judgment became a lien upon the undivided one-fifth (1/5) interest of said George A. Elder in the real estate in the complaint and answer herein described, but allege that the lien of said judgment was subject to a large number of judgments theretofore entered and dockted against said George A. Elder in the District Court of St. Louis County, Minnesota.

Plaintiffs admit that there purports to have been a sale of the lands in the complaint and answer herein described made by the Sheriff of St. Louis County, Minnesota, upon an execution issued upon the said judgment of February 9th, 1900, hereinbefore mentioned, to the defendants herein, but deny that they have any knowledge or information sufficient to form a belief as to whether the other allegations in said paragraph five contained are true or not.

And for further defense to and in avoidance of the matters and facts set up in the answer of said defendant, plaintiffs allege:

1.

That on or about the 8th day of November, 1895, one
29 George A. Elder, being then the owner of an undivided interest in and to the lands described in the complaint and answer herein, commenced an action in partition in the District Court of St. Louis County, Minnesota, against the Mesaba Land Company, Charles E. Dickerman, and other persons owning an interest in said premises, including all of the judgment creditors of said George A. Elder as well as the above named Charles E. Dickerman; that said action involved the matter of partitioning the lands described in the complaint and answer herein; that all of the persons interested in said land, whether as judgment creditors or as owners, were made parties to said action and duly served with the summons therein, including the above mentioned Charles E. Dickerman.

That at the time of the commencement of said action in partition, notice of Lis Pendens was duly filed in the office of the Register of Deeds in and for St. Louis County, Minnesota, for the purpose of partitioning the premises described in the answer and complaint herein, and that judgment would be entered in said action partitioning said premises, or ordering that the same should be sold,

and the proceeds of the sale thereof be divided among persons claiming an interest therein in case a partition of the premises was not practicable.

That on the 5th day of May, 1899, a judgment of partition was entered in said action adjudging and decreeing that said land could not be divided and partitioned, an ordering and decreeing that said land should be sold by referee to the highest
30 bidder, and the proceeds thereof distributed among the defendants in said action according to their respective rights under the law, and also appointing a referee to make a sale of the tract of land involved in said action; that the referee so appointed duly qualified as such referee, and thereafter said land was sold by said referee to the highest bidder in accordance with and pursuant to the said decree of partition, in the manner provided by law for sale of real estate under decrees of the court; that a notice of said sale was given as required by law and by said decree and that said land was sold at public auction to the highest bidder, as required by said decree and the law.

That said sale was thereafter duly confirmed by order of said court, and said referee was directed and ordered by said court to make deeds to said purchaser at said sale, and that such referee thereafter executed and delivered to said purchaser a good and sufficient deed conveying title to such highest bidder to said land; that subsequently plaintiffs other than the Oliver Iron Mining Company, became the owners in fee simple of said land by mesne conveyance of said real estate executed by said highest bidder, and his grantees, and of all of said land, and that the plaintiffs are now the owners thereof, and that the plaintiff Oliver Iron Mining Company subsequently secured a mining lease of said premises from the other plaintiffs herein.

31 Wherefore, Plaintiffs ask that they may have judgment as hereinbefore demanded.

JAQUES & JUDSON,
Attorneys for Plaintiffs.

(Duly verified.)

Due service admitted June 17, 1910.

H. J. GRANNIS,
Attorney for Defendant.

Filed in my office at — o'clock — — June 18, 1910.

J. P. JOHNSON,
Cl'k Dis't Court,
By R. E. JOHNSON, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Now come the plaintiffs, and for a supplemental complaint herein, allege:

That this action was brought among other things for the purpose of setting aside or having held invalid a certain execution sale of an undivided one-fifth (1/5) interest in the lands described in the complaint and other pleadings herein, to-wit: Lot two (2) or the Northwest quarter of Northeast quarter (NW¼ of NE¼) of
32 Section four (4), Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian, in St. Louis County, Minnesota.

That this action necessarily involves the determination of the validity or invalidity of said execution sale.

That said execution sale was made on an execution issued upon a certain judgment docketed on the 9th day of February, 1900, in the District Court for St. Louis County, in the Eleventh Judicial District of the State of Minnesota, wherein Charles E. Dickerman was plaintiff and the Syndicate Investment Company, American Loan & Trust Company, John McKinley, George A. Elder, and William McKinley were defendants, for the sum of Twenty-three thousand ninety-five & 34/100 ($23,095.34) dollars.

That said execution sale occurred on the 8th day of February, 1910, and that an undivided one-fifth (1/5) of the land hereinbefore described was sold on said execution to the defendant herein, Henry J. Grannis and Charles K. Dickerman for the sum of Fifteen thousand ($15,000.) dollars.

That on the 8th day of February, 1911, plaintiff deposited or caused to be deposited, with the Sheriff of St. Louis County Minnesota, the amount necessary to redeem such premises at the date of the expiration of the time for redemption from said sale, to-wit;
the sum of Sixteen thousand and fifty-nine ($16,059.00.)
33 dollars, together with a bond in the sum of twelve hundred fifty ($1,250.) Dollars, and with sureties thereon, which have been approved by said sheriff of St. Louis County, Minnesota, conditioned to pay all interest that may hereafter accrue or be allowed on such deposit until final redemption, if necessary, of said premises.

That said sum of money and bond have been delivered and deposited with the said Sheriff of St. Louis County, pursuant to Sec. 4315 of the Revised Statutes of Minnesota for the year 1905, for the

purpose of extending the time of redemption in said execution sale until thirty days after the final determination of this action.

Wherefore, plaintiffs pray that the Court in this action shall, in its judgment and decision, determine the validity of said execution sale and the rights of the parties to the moneys and bond so deposited with the Sheriff, and in said judgment adjudge and direct to whom said money and bond shall be delivered by said Sheriff of St. Louis County.

JAQUES & HUDSON,
Attorneys for Plaintiffs.

(Duly verified.)

Service of the within by copy admitted this 8th day of February, 1911, subject to all objections to sufficiency of this complaint or request of p't'ffs to serve and file same.

H. J. GRANNIS,
Attorney for Defendants.

Filed in my office at — o'clock — m. Feb. 8, 1911.
J. P. JOHNSON,
Cl'k Dist. Court.
By R. E. JOHNSON, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis:

District Court, Eleventh Judicial District.

34 ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Answer to Supplemental Complaint.

The above named defendants make this their answer to the supplemental complaint of the plaintiffs, filed herein February 8th, 1911:

1. Defendants deny each and every allegation in said supplemental complaint contained, except such allegations as are hereinafter admitted.

2. Defendants admit the allegations contained in said supplemental complaint, commencing with the words "That said execution sale was made on an execution issued upon a certain judgment docketed on the 9th day of February, 1900," where the same occur on the first page of said supplemental complaint and ending with the words "for the sum of fifteen thousand ($15,000) dollars," where the same occur on the second page of said supplemental complaint.

3. Defendants admit that on the 8th day of February,
35 1911, certain of the plaintiffs deposited with the Sheriff of St. Louis County, Minnesota, the sum of sixteen thousand fifty-nine ($16,059.00) dollars, but defendants allege that such deposit was not made in compliance with the provisions of Section 4315, Revised Laws of Minnesota, 1905. Defendants also admit that at the time of making said deposit, a bond in the sum of twelve hundred fifty ($1,250.00) dollars was furnished to said Sheriff by certain of the plaintiffs, but defendants allege that said bond, except as to sufficiency of the sureties thereon, was not given in compliance with the provisions of said Section 4315 Revised Laws of Minnesota, 1905.

4. Further answering said supplemental complaint, defendants allege that on the 8th day of February, 1911, the plaintiffs did not have the right to redeem the land described in said supplemental complaint, from the execution sale in said supplemental complaint described and further that the plaintiffs have not now the right to redeem said land, from said execution sale and that on the said 8th day of February, 1911, the plaintiffs were not entitled to avail themselves of the provisions of said Section 4315, Revised Laws of Minnesota, 1905.

5. Further answering said supplemental complaint, defendants allege that the above entitled action is not one brought to set
36 aside an execution sale of land, within the meaning of the provisions of said Section 4315, Revised Laws of Minnesota, 1905.

Wherefore, the defendants demand judgment as prayed for in their several answers in the above entitled action and that no relief be awarded the plaintiffs under said supplemental complaint.

H. J. GRANNIS,
Attorney for Defendant.

(Duly verified.)

Due and personal service of the within answer by copy at Duluth, Minn. is hereby admitted this 24th day of February, 1911.

JAQUES & HUDSON,
Attorneys for Plaintiff.

Filed in my office at — o'clock — m. Feb. 25, 1911.

J. P. JOHNSON,
Cl'k Dist. Court.
By R. E. JOHNSON, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Findings.

This case having come regularly on for trial before the
37 Court, without a jury, on the 4th day of August, 1910, Jaques & Hudson, John G. Williams, Esq., and William Elder, Esq., appearing as attorneys for plaintiffs, and Henry J. Grannis, Esq., appearing at attorney for the defendants, and the respective parties having adduced their evidence and having made their arguments, and the Court having heard the evidence and arguments of counsel and being fully advised in the premises, now finds the following as

Matters of Fact.

1.

That on the 8th day of November, 1895, and for some time prior thereto, George A. Elder, Mesaba Land Company, John McKinley and the Poca Iron Company, were the owners of the following described real estate situated in the County of St. Louis and State of Minnesota, to-wit: Lot two (2) of Section four (4), Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian, in the following proportions, to-wit: George A. Elder an undivided 1/5, Mesaba Land Company an undivided 1/5, John McKinley an undivided 1/5, and Poca Iron Company an undivided 2/5.

That on said date there were docketed in the judgment lien dockets in the office of the Clerk of the District Court of St. Louis County, Minnesota, against said George A. Elder, the following judgments to-wit:

38

Judgment creditors.	Date of docketing.	Am't.
Don A. Dodge	Oct. 6, 1893	$260.84
Nat'l Bank of Commerce	Jan. 3, 1894	1,730.50
Eliza Hart	Jan. 9, 1894	1,684.84
Wilson G. Crosby, Receiver	M'ch 26, 1895	100.00
Marine National Bank	Aug. 17, 1895	3,996.66

Nat'l German American Bank, St. Paul	Aug.	18, 1894	2,723.83
1st Nat'l Bank of Duluth	Sept.	18, 1894	2,287.05
Josiah Wolf and others	Sept.	1, 1894	5,296.96
1st National Bank of Newark	July	24, 1895	3,771.20
Mack & Nye	Oct.	31, 1894	28,894.16

That said several judgments were duly rendered and entered in said District Court and the same, and each thereof, were, on and prior to November 8th, 1895, liens upon the said interest of said George A. Elder in said lands.

That on said 8th day of November, 1895, there were docketed in the judgment lien dockets in the office of the Clerk of the District Court of said County of St. Louis, against said John McKinley, the following judgments, to-wit:

	Judgment creditors	Date of docketing.	Am't.
	Anna J. Thoresen	Sept. 23, 1893	$1,176.51
	Don A. Dodge	Oct. 6, 1893	261.89
	National Bank of Commerce	Nov. 22, 1893	1,599.95
39	John Beckfeldt, Oscar Mather	Dec. 8, 1893	548.82
	Albert Geilfuss, Assignee	Jan. 5, 1894	2,854.02
	1st Nat. Bank Richfield Springs	Jan. 5, 1894	2,599.26
	" " " "	Jan. 5, 1894	5,245.85
	Portsmouth Trust and Guaranty Co.	Jan. 5, 1894	2,402.70
	Eliza Hart	Jan. 9, 1894	1,684.84
	Internat'l Bank of West Superior	Jan. 10, 1894	2,265.50
	Albert B. Geilfuss, Assignee	Jan. 10, 1894	2,125.60
	W. J. Powers, H. D. Powers	Jan. 27, 1894	350.28
	1st Nat. Bank of Cooperstown	Apr. 5, 1895	21,282.78
	2nd Nat. Bank Mauch Chunk, Pa.	Ap'l 5, 1894	3,201.97
	Bank of Baldwin	Ap'l 5, 1894	5,499.00
	Keystone Nat. Bank, West Superior	Ap'l 28, 1894	5,499.01
	Keystone Nat. Bank, West Superior	Ap'l 28, 1894	5,476.82
	Thomas S. Buckham	May 2, 1894	6,655.90
	S. J. Wright	May 3, 1894	5,231.46
	W. L. Jackson	May 31, 1894	414.56
	M. M. Dye, W. H. Dye	Aug. 23, 1894	5,485.15
	Northern Trust Company	July 7, 1894	4,119.99
40	1st Nat. Bank of Arcanum	July 12, 1894	3,416.16
	M. M. Dye, W. H. Dye	Sept. 6, 1894	2,824.07
	William E. Richardson	Sept. 1, 1894	8,896.63
	" " "	Sept. 1, 1894	1,115.12
	Louis D. Wilkes	Sept. 1, 1894	2,357.52
	1st Nat. Bank of Punxsutawney	Sept. 14, 1894	3,808.23
	E. T. Archibald	Oct. 2, 1894	2,181.38
	E. W. Peet & Son	Oct. 9, 1894	216.67
	Keystone Driller Co	Oct. 9, 1894	1,460.95
	Wells Stone Mercantile Co	Oct. 11, 1894	1,293.61
	William E. Richardson	Oct. 12, 1894	31,389.59
	Nat'l Bank of Redemption	Oct. 15, 1894	5,545.07
	Lime Rock Nat'l Bank	Oct. 17, 1894	5,446.38

Orrin D. Kinney, Jos. Sellwood	Oct. 25, 1894		90.50
D. A. Wheeler	Nov. 3, 1894		5,736.40
Nat'l Bank of Redemption	Nov. 23, 1894		5,592.63
Wm. G. Heinman	M'ch 11, 1895		3,134.04
Wilson G. Crosby, Receiver	M'ch 27, 1895		500.00
1st Nat. Bank Madison, Wis	M'ch 16, 1895		3,636.37
Marine National Bank	June 18, 1895		4,029.47
William Plankinton, Assignee	July 18, 1895		3,050.74
Hudson Wilson	Aug. 24, 1895		2,282.57
Frank Crassweller	Sept. 14, 1895		1,986.21
41 Frank Crassweller	Sept. 14, 1895		2,926.75
John M. Williams	June 21, 1895		160,827.00

That said several judgments were duly rendered and entered in said District Court and the same and each thereof were, on and prior to November 8, 1895, liens upon the said interest of said John McKinley in said lands.

That the aforesaid judgment for $2,854.02, described as docketed Jan. 5, 1894, in favor of Albert Geilfuss, Assignee, and against said John McKinley, was entered in the judgment book and appeared in the judgment roll, in the office of the Clerk of said District Court as in favor of Albert B. Geilfuss, Assignee.

That on said 8th day of November, 1895, the undivided 1/5 interest in said premises owned by the Mesaba Land Company was subject to the lien of a certain mortgage dated January 11, 1894, executed by Mesaba Land Company in favor of August Schupp, given to secure the sum of $11,315.95, together with interest at the rate of seven per cent (7%) per annum. This mortgage included a large tract of other lands and was recorded in the office of the Register of Deeds of St. Louis County, Minnesota, on January 12, 1894, in Book 76 of Mortgages, on page 575.

That on said 8th day of November, 1895, the undivided 2/5 interest in said premises of the Poca Iron Company was free from any liens or encumbrances.

42 II.

That on said 8th day of November, 1895, said George A. Elder commenced a partition action in the District Court for St. Louis County, Minnesota, against the other owners of the above described premises, and except, as hereinafter otherwise found, against all of the judgment lien creditors above enumerated. That the name Albert Geilfuss, Assignee, and the name Albert B. Geilfuss, Assignee, did not appear among the names of the defendants named in said action in the summons or other files or records therein. That Albert Guilfuss, assignee, was named as a defendant in said action, and it was alleged in the complaint and found and determined in the findings and judgment therein that he was the owner of the said judgment of $2,854.02 against said John McKinley, hereinbefore and hereinafter described; and Albert B. Guilfuss was named as a defendant in said action, and it was alleged in the complaint and found and determined in the findings and judgment therein that he was the

owner of the said judgment of $2,125.60 against said John McKinley hereinbefore and hereinafter described; and it was alleged in said complaint and found and determined in the findings and judgment in said action that said judgments were on file and of record in said court in favor of said Albert Guilfuss, assignee, and said Albert B. Guilfuss, respectively. That in fact said judgments were entered and docketed as herein set forth and at the time of filing said
43 complaint and of making said findings and of entering said judgment in said partition action they were each owned by Albert B. Geilfuss, assignee. That said action was also brought against certain judgment creditors of one A. E. Humphreys, including C. E. Dickerman, who, it was alleged in the complaint, claimed to have liens upon said premises by reason of judgments docketed against said Humphreys, and said action was also brought against August Schupp, the holder of the aforesaid mortgage lien upon the one-fifth interest of the Mesaba Land Company. That said A. E. Humphreys had no interest in the premises involved in said partition action.

That the complainant in said partition action set forth and described said mortgage and said several judgments and the liens claimed thereunder, except that the allegations as to the said judgments in favor of Albert Geilfuss, assignee, and Albert B. Geilfuss, Assignee, and against said John McKinley were as hereinbefore set forth.

That said action, last above referred to, was brought for the sole purpose of partitioning the above described lands and also the Northwest quarter of the Southwest quarter (N. W. ¼ of S. W. ¼) of Section five (5), the Northeast quarter of the Southeast quarter (N. E. ¼ of S. E. ¼) and Lots two (2), four (4), and five (5) of Section Six (6), all in Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian, in
44 said county of St. Louis, or in case said lands could not be partitioned, to have the same sold under the decree of the court therein and the proceeds of such sale distributed among the parties thereunto entitled, and said purpose was expressed in the prayer for judgment contained in the complaint in said action.

That a lis pendens was filed in said partition action in the office of the Register of Deeds of St. Louis County, Minnesota, on the 9th day of November, 1895, giving notice of the pendency and object of said action.

That all of the defendants in said action were duly served with the summons therein, except as herein otherwise found. That said defendant, C. E. Dickerman, was served with the summons therein at St. Paul, Minnesota, on the 31st day of January, 1896.

That on the 4th day of January, 1894, said Albert B. Geilfuss, Assignee, duly recovered a judgment in the District Court in and for St. Louis County, Minnesota, against said John McKinley, for the sum of $2,854.02, but that said judgment was docketed in the judgment lien docket in the office of the Clerk of said District Court on the 5th day of January, 1894, in the name of Albert Geilfuss, As-

signee, as judgment creditor, and against said John McKinley, as judgment debtor.

That said Albert B. Geilfuss, Assignee, on January 10,
45 1894, obtained another judgment against said John McKinley for the sum of $2,125.60, which judgment was docketed in the judgment lien dockets in said District Court on the 10th day of January, 1894, in the name of Albert B. Geilfuss, Assignee.

That each of the aforesaid judgments in favor of said Albert B. Geilfuss, Assignee, and against said John McKinley, upon the docketing thereof, as aforesaid, became and was a lien upon the undivided 1/5 interest of said John McKinley in the aforesaid lands and also upon other lands and real estate and interests in the same, then owned by said John McKinley, including the Southeast quarter of the Northwest quarter (S. E. ¼ of N. W. ¼) of Section twenty-two (22), and the Northwest quarter of the Northeast quarter (N. W. ¼ of N. E.¼) of Section twenty-eight (28), in Township fifty (50) North of Range twenty (20) West of the Fourth Principal Meridian, and the Southeast quarter of the Southeast quarter (S. E. ¼ of S. E. ¼) of Section thirty-three (33), in Township fifty-seven (57) North of Range twenty (20) West of the Fourth Principal Meridian, and the undivided 1/5 of the Northwest quarter of the Southwest quarter (N. W. ¼ of S. W. ¼) of Section five (5), the Northeast quarter of the Southeast quarter (N. E. ¼ of S. E. ¼) and Lots two (2), four (4) and five (5), of Section six (6), all in Township fifty-eight (58) North of Range Seventeen (17) West of the Fourth Principal Meridian, all in the County of St. Louis and State of Minnesota.

46 That there was no personal service of the summons in said partition action upon the said Albert Geilfuss, assignee, nor upon the said Albert B. Geilfuss, assignee, and that neither the said Albert Geilfuss, assignee, nor the said Albert B. Geilfuss, assignee, in any manner appeared therein. That service of the summons upon the defendants named therein as Albert Guilfuss, assignee, and Albert B. Guilfuss was by publication thereof and not otherwise, and that neither the said Albert Guilfuss, assignee, nor the said Albert B. Guilfuss, in any manner appeared in said action.

That a copy of the summons in said action was duly mailed to Albert Guilfuss, Assignee, at Milwaukee, Wisconsin, and a copy thereof was also duly mailed to Albert B. Guilfuss, at Milwaukee, Wisconsin.

That prior to the 20th day of February, 1896, and after the commencement of said partition action, the Sheriff of St. Louis County, Minnesota, in which County said action was brought, made a return upon the summons in said partition action that the defendant Albert Guilfuss, Assignee, and Albert B. Guilfuss, could not be found in said County of St. Louis, and filed said return in the office of the Clerk of the District Court for said St. Louis County.

That on the 20th day of February, 1896, an affidavit of one of the attorneys of the plaintiff in said partition action was filed
47 with the Clerk of the District Court for said St. Louis County, stating that he believed that the defendants Albert Guilfuss,

Assignee, and Albert B. Guilfuss, were not residents of the State of Minnesota and could not be found therein.

That said affidavit stated that after the commencement of said partition action, affiant had deposited copies of the summons in said action in the Post-office with postage prepaid, directed to each of the defendants at their respective places of residence, to-wit: one to Albert Guilfuss, Assignee, Milwaukee, Wisconsin, one to Albert B. Guilfuss, Milwaukee, Wisconsin, and stating that the subject of said partition action was real property situated in the County of St. Louis and State of Minnesota hereinbefore described, and that each of said defendants had and claimed a lien and interest in said real estate, and that the relief demanded in said action consisted in excluding them, said above named defendants, and each of them, from any interest or lien therein.

That thereafter the said summons in said partition action was duly and regularly published in the Duluth Evening Herald, a newspaper published in Duluth, Minnesota, on the 20th and 27th days of February, the 5th, 12th, 19th and 26th days of March, and on the 2nd day of April, 1896, that during the time of the publication of said summons said Duluth Evening Herald was a legal newspaper in accordance with the laws of the State of Minnesota.

48 That on the 5th day of May, 1899, a judgment was entered in said partition action adjudging and decreeing the ownership of the lands therein involved, as hereinbefore stated; that said lands could not be divided and partitioned, and ordering and decreeing that said lands should be sold by a referee to the highest bidder and the proceeds thereof distributed among the defendants in said action, according to their respective rights under the law, and also appointing a referee to make a sale of said lands, a true and correct copy of which judgment, marked Exhibit "A," is hereto attached and made a part hereof.

That the referee so appointed duly qualified as such, and that thereafter said lands were sold by said referee to the highest bidder, to-wit: August Schupp, for the sum of six thousand seven hundred ($6,700.) dollars, in accordance with and pursuant to said decree of partition in the manner provided by law for sale of real estate under the decree of the court. That a notice of said sale was given, as required by law and by said decree, and that said land was sold at public auction to the highest bidder, to-wit: August Schupp.

That said sale was thereafter duly confirmed on the 28th day of April, 1900, by order of said court and said referee, was directed and ordered by said court to make a deed to said purchaser at said sale, and that the referee thereafter executed and delivered to said

49 purchaser, to-wit: to August Schupp, such highest bidder, a good and sufficient deed to said land.

That subsequently plaintiffs in this action became the owners in fee simple, by mesne conveyances, of such interest in said land as had been acquired by said August Schupp, under said referee's deed in the proportions stated in the complaint.

That in said partition action it was alleged in the complaint and found by the court and adjudged that the lands involved therein

and hereinbefore described, including said Northwest quarter of Southwest quarter (N. W. ¼ of S. W. ¼) of Section five (5), the Northeast quarter of the Southeast quarter (N. E. ¼ of S. E. ¼) and Lots two (2), four (4) and five (5), of Section six (6), all in Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian, were of the value of twelve hundred ($1,200.00) dollars.

III.

That the Geilfuss judgment against John McKinley docketed January 5th, 1894, for the sum of two thousand eight hundred fifty-four and 2/100 ($2,854.02) dollars, hereinbefore described, was in October, 1901, for a valuable consideration, duly assigned to one Timlin, and the same was thereafter, for a valuable consideration, duly assigned by said Timlin to F. L. Buell, and both of said
50 assignments were duly filed in the office of the Clerk of said District Court.

That thereafter execution was duly issued out of said District Court upon said judgment, last above mentioned, directed to the Sheriff of said St. Louis County, who thereupon duly levied upon the aforesaid undivided 1/5 interest of said John McKinley, in and to the lands described in the complaint in this action and hereinbefore described, and also upon certain other lands including the said Southeast quarter of Northwest quarter (S. E. ¼ of N. W. ¼) of Section twenty-two (22), the Northwest quarter of the Northeast quarter (N. W. ¼ of N. E. ¼) of Section twenty-eight (28), in Township fifty (50) North of Range twenty (20) West of the Fourth Principal Meridian, and the Southeast quarter of the Southeast quarter (S. E. ¼ of S. E. ¼) of Section thirty-three (33) in Township fifty-seven (57), north of Range twenty (20), West of the Fourth Principal Meridian, and the undivided 1/5 of the Northwest quarter of the Southwest quarter (N. W. ¼ of S. W. ¼) of Section five (5), the Northeast quarter of the Southeast quarter (N. E. ¼ of S. E. ¼) and Lots two (2), four (4) and five (5) of Section six (6), all in Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian, all in said County of St. Louis, and thereafter on the 30th day of December, 1901, said Sheriff after having given due notice, duly sold the lands so levied upon, including the lands hereinbefore described,
51 and certain other lands, in one parcel, to said F. L. Buell, for the sum of twenty-one hundred ($2,100.) dollars, and said sheriff thereupon duly executed and delivered to said Buell his certificate of said sale, in proper form, and the same was recorded in the office of the Register of Deeds of said County of St. Louis in Book 191 of Deeds, page 295.

That the Wells Stone Mercantile Company, a corporation, was a party defendant in the partition action hereinbefore described and was duly served with the summons therein on the 13th day of November, 1895. That at the time said partition action was commenced, said corporation was a judgment creditor in a judgment which had been previously entered and docketed in the District Court

for said St. Louis County against the aforesaid John McKinley, hereinbefore referred to, but that it then had no other interest in or lien upon the lands involved in said partition action. That during the pendency of said partition action, and on August 15th, 1896, another judgment was duly entered and docketed in the District Court for said St. Louis County, in favor of said Wells Stone Mercantile Company and against the said John McKinley, for the sum of five hundred sixty-three and 46/100 ($563.46) dollars. That said last mentioned judgment, upon the docketing thereof, as aforesaid, became and was a lien upon the said Southeast quarter of the Northwest quarter (S. E. ¼ of N. W. ¼) of Section twenty-two (22), and the Northwest quarter of the Northeast quarter (N. W. ¼ of
52 N. E. ¼) of Section twenty-eight, 28), in Township fifty (50) North of Range twenty (20) West of the Fourth Principal Meridian, and the Southeast quarter of the Southeast quarter (S. E. ¼ of S. E. ¼) of Section thirty-three (33), in Township fifty-seven (57) North of Range twenty (20) West of the Fourth Principal Meridian, all then owned by said John McKinley and on certain other lands, all situated in said County of St. Louis and continued to be and was a lien thereon at the time of said execution sale and up to and at the time of the redemption from said execution sale, hereinafter mentioned. That on the 21st day of April, 1900, the judgment last referred to was, for a valuable consideration, duly assigned by said Wells Stone Mercantile Company to Frank Hicks, which assignment was duly filed in the office of the Clerk of said District Court on the 10th day of February, 1902.

That within one year from and after said 30th day of December, 1901, the date of the aforesaid execution sale, said Frank Hicks duly filed in the office of the Clerk of said District Court, notice of intention to redeem the lands sold upon said execution sale, as aforesaid, as a creditor having a lien by virtue of his ownership, by assignment of said Wells Stone Mercantile Company judgment against said John McKinley, for five hundred sixty-three & 46/100 ($563.46) dollars and within the proper time and in the proper manner, said Hicks redeemed the said lands sold to said F. L. Buell under said
53 Geilfuss judgment against John McKinley, as aforesaid, and there was no other redemption from said execution sale. That said Hicks claimed the right to make said redemption and was entitled to and did make the same, as a creditor of said John McKinley, by virtue of his ownership by assignment, as aforesaid, of said judgment docketed August 15th, 1896, in favor of Wells Stone Mercantile Company and against said John McKinley and the lien of said judgment upon the said lands, or some part thereof, sold upon said execution sale, as aforesaid. That upon said redemption being made, the Sheriff of said St. Louis County, duly executed and delivered to said Frank Hicks a certificate of redemption in due form, and the same was duly recorded in the office of the Register of Deeds of said County of St. Louis in Book 198 of Deeds, page 253.

That the defendant Henry J. Grannis is the owner by mesne conveyances of any and all interest that Frank Hicks acquired by the aforesaid redemption, in and to the undivided 1/5 of the lands

involved in this action and hereinbefore described, which undivided 1/5 was formerly owned by said John McKinley.

That in the execution sale proceeding above described and in the said redemption by Frank Hicks, the Geilfuss judgment docketed January 5th, 1894, and upon which said execution sale was had was described as being in favor of Albert Geilfuss, Assignee, not as being in favor of Albert B. Geilfuss, Assignee, but was otherwise
54 correctly and fully described and identified and in the redemption certificate the book and page of record of the said certificate of execution sale were correctly given, and the excution mentioned in said certificate of execution sale contained a reference to the judgment roll, by way of further description of the judgment upon which said execution was issued.

IV.

That on the 9th day of February, 1900, Charles E. Dickerman duly obtained and entered a judgment against George A. Elder and others in the District Court of St. Louis County, Minnesota, for the sum of twenty-three thousand ninety-five and 34/100 ($23095.34) dollars, which judgment was on said 9th day of February, 1900, docketed in the office of the Clerk of the District Court of said County of St. Louis and thereupon became a lien upon any and all real estate or interests therein then owned by said George A. Elder, in said County of St. Louis, or which he might thereafter acquire.

That thereafter the said Charles E. Dickerman died and his said judgment of February 9th, 1900, against George A. Elder descended to and became vested in his heirs and that thereafter the said judgment was, for a valuable consideration, duly assigned by said heirs to Henry J. Grannis and Charles K. Dickerman,
55 the defendants herein, which assignment was, prior to the issuing of the execution hereinafter mentioned, filed in the office of the Clerk of said District Court.

That thereafter and on the 27th day of December, 1909, execution was duly issued out of said District Court on said judgment directed to the Sheriff of said County of St. Louis, and that under and by virtue of said execution, said Sheriff duly levied upon and sold, upon due and proper notice, among other lands, the interest of the defendant, George A. Elder, in the lands described in the complaint herein and hereinafter described.

That said execution sale took place on the 8th day of February, 1910, and the interest of said George A. Elder in the aforesaid lands described in the complaint herein, was sold to the defendants Henry J. Grannis and Charles K. Dickerman, for the sum of fifteen thousand ($15,000) dollars. That the sheriff of said St. Louis County duly executed and delivered to said defendants a certificate of said sale in due form which certificate was duly recorded in the office of the Register of Deeds of said St. Louis County in Book 329 of Deeds, page 193. That there has been no redemption from said execution sale.

V.

That on the 8th day of February, 1911, the plaintiffs deposited with the Sheriff of St. Louis County, Minnesota, the amount
56 necessary to redeem the lands described in the complaint herein, sold on said execution sale, as aforesaid, at the date of the expiration of the time for redemptian from said sale, to-wit:—the sum of sixteen thousand fifty-nine ($16,059.00) dollars, together with a bond in the sum of twelve hundred and fifty ($1250.) dollars, and with sureties thereon which had been approved by said Sheriff of St. Louis County. Minnesota, conditioned to pay all interest that might thereafter accrue or be allowed on said deposit, until final redemption, if necessary, of said premises.

That said sum of money and bond were deposited with and delivered to the said Sheriff of St. Louis County, pursuant to Section 4315 of the Revised Laws of Minnesota for the year 1905, for the purpose of extending the time of redemption of said execution sale until thirty days after the final determination of this action, and that said deposit and bond were brought to the attention of the court by a supplemental complaint duly served and filed in this action.

That the plaintiffs did not produce to said Sheriff, at or before the time of the making of said deposit, and the giving of said bond, or at any time on or before said 8th day of February, 1911, any of the documents or papers specified in Sections 4312 and 4482, Revised Laws of Minnesota of 1905. That the plaintiffs did not on or prior to the said 8th day of February, 1911, file in the office of the Clerk of said District Court, any notice of intention to redeem
57 from said execution sale, and it does not appear that the plaintiffs, or any of them, were creditors of said George A. Elder, on and prior to said 8th day of February. That on or prior to said 8th day of February, 1911, neither the plaintiffs, nor any of them, nor any of their immediate or remote grantors, had any conveyance or transfer from said George A. Elder of an undivided 1/5 of the lands described in the complaint herein, or any part of said 1/5 interest, except such conveyance and transfer thereof as was made pursuant to the judgment in said partition action and the sale and proceedings thereunder, all of which have heretofore been mentioned.

VI.

That heretofore and on the 13th day of April, 1910, the plaintiffs filed a notice of lis pendens of this action in the office of the Register of Deeds of said County of St. Louis and the same was recorded in Book 202 of Mortgages, page 572, in the office of said Register of Deeds; and on the 29th day of July, 1910, the defendants filed a notice of lis pendens of this action in the office of said Register of Deeds and the same was recorded in said office in Book 204 of Mortgages, page 220.

That at the time of the commencement of this action, the premises described in the complaint herein were vacant and unoccupied.

58 VII.

That the above named plaintiff, the Oliver Iron Mining Company, is the owner and holder of a mining lease upon said premises executed by and between the other plaintiffs above named, or their predecessors in interest, and the said Oliver Iron Mining Company, dated November 8, 1902, and recorded December 31, 1902, at 9:30 o'clock A. M. in the office of the Register of Deeds in and for St. Louis County, Minnesota, in Book X of Agreements, at page 422, which lease is for a term of fifty years from October 1, 1902, and in terms covers the whole of the above described premises, and entitles the said Oliver Iron Mining Company to explore for, mine and remove from said premises, the merchantable iron ore and other minerals with the right to cut and use all the timber other than pine, necessary for fuel and buildings, and for drains, tramways, supports and for shafts in mines or connecting the same with any railway, said Oliver Iron Mining Company to pay a royalty on iron ore of twenty-five cents per gross ton, said lease containing other provisions and conditions ordinary and usual in a mining lease.

Conclusions of Law.

As Conclusions of Law from the foregoing facts the court finds and decides:

1. That the plaintiffs other than the plaintiff Oliver Iron
59 Mining Company, are the owners in fee simple of an undivided four-fifths (4/5) of the land in the complaint and hereinbefore described to-wit: Lot two (2), of Section four (4), Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian, in the proportions set forth in said complaint, subject, however, to a certain mining lease executed by the plaintiffs herein other than the Oliver Iron Mining Company in favor of said Oliver Iron Mining Company dated November 8, 1902, and recorded December 31, 1902, at 9:30 o'clock A. M. in the office of the Register of Deeds in and for St. Louis County, Minnesota, in Book X of Agreements, at page 422, which lease is for a term of fifty years from October 1, 1902, and in terms covers the whole of the above described premises, and entitles the said Oliver Iron Mining Company to explore for, mine and remove from said premises the merchantable iron ore and other minerals with the right to cut and use all the timber other than pine, necessary for fuel and buildings, and for drains, tramways, supports and for shafts in mines or connecting the same with any railway, said Oliver Iron Mining Company to pay a royalty on iron ore of twenty-five cents per gross ton, said lease containing other provisions and conditions ordinary and usual in a mining lease, and that the defendants have not, nor *have* either of them, any right or title to, interest in or lien upon said undivided four-fifths (4/5) interest.

2. That the defendant, Henry J. Grannis, is the owner
60 in fee simple of an undivided one-fifth (1/5) of said lands in said complaint and hereinbefore described, and that the

plaintiffs have not, nor have any of them, any right or title to, interest in, or lien upon said undivided one-fifth (1/5) interest and that said interest is not subject to the aforesaid mining lease and the defendant Grannis is not bound by the terms thereof.

3. That the judgment docketed on the 9th day of February, 1900, in favor of Charles E. Dickerman and against George A. Elder, was not a lien upon the interest of George A. Elder in the lands hereinbefore described, and that the execution sale thereunder is invalid and void, and that the plaintiffs are entitled to receive from the Sheriff of St. Louis County, the money and bond deposited with said Sheriff under Section 4315 of the Revised Laws of Minnesota for the year 1905.

Let judgment be entered accordingly.

By the Court:

WM. A. CANT,
District Judge.

Oct. 3, 1911. A stay of proceedings for thirty days is hereby ordered. Octo. 3, 1911.

WM. A. CANT, *Judge.*

EXHIBIT "A."

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

61 GEORGE A. ELDER, Plaintiff,
vs.
MESABA LAND COMPANY, et al., Defendants.

The above entitled action having been brought on for trial on the 24th day of June, 1896, before the Honorable S. H. Moer, judge of said court, without a jury, and said cause having been duly submitted and tried before the court, and the court having made its findings of fact and conclusions of law, of date April 29th, 1899, which said findings and conclusions were filed in said court on the 3rd day of May, 1899;

And the court having found as matters of fact that on the 24th day of June, 1896, the said plaintiff, George A. Elder, was the owner in fee of an undivided 1/5 interest in and to the premises described in the complaint in said cause; and that the said defendant Mesaba Land Company was a corporation duly created and existing under the laws of the State of Minnesota, and was on said day the owner in fee of an undivided 1/5 interest in and to said premises; and that on said 24th day of June, 1896, the said defendant John McKinley was the owner in fee of an undivided 1/5 interest in and to said premises; and that on said 24th day of June, 1896, the said defendant Poca Iron Company was a corporation duly created and existing under and by virtue of the laws of the
62 State of Minnesota, and was on said day the owner in fee of an undivided 1/5 interest in and to said premises; and that the various parties set forth in said findings were judgment creditors

and mortgagees, as therein specified; and that said premises, consisting of two hundred and forty (240) acres of land, are vacant and unoccupied, and are not suitable for agricultural purposes and have no tangible value for any other purpose other than prospective mineral purposes; and that the value of said property does not exceed the sum of Twelve Hundred Dollars ($1,200);

And the court having found, as conclusions of law, that a partition of said premises cannot be made without prejudice to the owners and parties interested therein; and that said premises should be sold at public auction to the highest bidder for cash;

And that William D. Underhill, of the City of Duluth, be appointed referee of said court, for the purpose of making a sale of said premises; and that said referee be required to make a sale of said premises at public auction, to the highest bidder for cash, upon notice published in the manner required for the sale of real estate on execution; and that said referee make a report of said sale to said court of his proceedings therein; and that the costs and disbursements of this action be taxed and allowed, together with the sum of Two Hundred and Fifty Dollars ($250.00) attorney's fees; and

63 that the total amount of said costs be apportioned among the several owners of said premises in proportion to their interest therein, and be inserted in the judgment; it is

Now therefore, hereby ordered and adjudged, that the plaintiff have judgment as prayed for in his complaint herein.

It is ordered and adjudged, that on the 24th day of June, 1896, the said plaintiff, George A. Elder, was the owner in fee of an undivided 1/5 interest in and to the premises described in the said complaint, to-wit: Lot two (2) of Section four (4), the Northwest quarter of the Southwest quarter of Section five (5), Lots two (2), four (4) and five (5) of Section six (6) and the Northeast quarter of the Southeast quarter of Section six (6) all in Township 58 North of Range 17 West;

That on said 24th day of June, 1896, the said defendant Mesaba Land Company was a corporation duly created and existing under the laws of the State of Minnesota, and was on said day the owner in fee of an undivided one fifth interest in and to said premises;

That on said 24th day of June, 1896, said defendant John McKinley was the owner in fee of an undivided 1/5 interest in and to said premises;

That on said 24th day of June, 1896, said defendant Poca Iron

64 Company was a corporation created and existing under the laws of the State of Minnesota and was on said day the owner in fee of an undivided 1/5 interest in and to said premises.

It is further ordered and adjudged that on said 24th day of June, 1896, said defendant August Schupp was the owner and holder of a mortgage upon the undivided 1/5 interest in said premises owned by defendant Mesaba Land Company, which mortgage was dated August 11th, 1894 and that the amount of said mortgage was $11,315.95, with interest at the rate of seven per cent per annum from August 11th, 1894. And

It is further ordered and adjudged that the following described judgments were, on said 24th day of June, 1896, on file and of

record in said court against the said defendant John McKinley, to-wit:

Judgment creditor.	Date of docketing.	Amount.
Anna J. Thoresen	Sept. 23, 1883	$1,176.51
Don A. Dodge	Oct. 6, 1893	261.89
National Bank of Commerce	Nov. 22, 1893	1,599.95
John Beckfelt, Oscar Mather	Dec. 8, 1893	548.82
Albert Guilfuss, Assignee	Jan. 5, 1894	2,854.02
1st Nat. Bank Richfield Springs	" 5, 1894	2,599.26
1st Nat. Bank Richfield Springs	" 5, 1894	5,245.85
65 Portsmouth Trust & Guaranty Co.	" 5, 1894	2,402.70
Eliza Hart	" 9, 1894	1,684.84
Internat'l Bank of W. Sup	" 10, 1894	2,265.50
Albert B. Guilfuss	" 10, 1894	2,125.60
W. J. Powers, H. D. Powers	" 27, 1894	350.28
1st Nat. Bank, Cooperstown	Ap'l 5, 1895	21,282.78
2nd Nat. Bank Mauch Chunk, Pa	" 5, 1894	3,201.97
Bank of Baldwin	" 5, 1894	5,499.00
Keystone Nat. Bank West Sup	" 28, 1894	5,499.01
Keystone Nat. Bank West Sup	" 28, 1894	5,476.82
Thomas S. Buckham	May 2, 1894	6,655.90
S. J. Wright	" 3, 1894	5,231.46
W. L. Jackson	" 31, 1894	414.56
M. M. Dye, W. H. Dye	Aug. 23, 1894	5,485.15
Northern Trust Company	July 7, 1894	4,119.99
1st Nat. Bank of Arcanum	July 12, 1894	3,416.16
M. M. Dye, W. H. Dye	Sept. 6, 1894	2,824.07
William E. Richardson	" 1, 1894	8,896.63
William E. Richardson	" 1, 1894	1,115.12
Louis D. Wilkes	" 1, 1894	2,357.52
1st Nat. Bank Punxsutawney.	" 14, 1894	3,808.23
66 E. T. Archibald	Oct. 2, 1894	2,181.38
E. W. Peet & Son	" 9, 1894	216.67
Keystone Driller Co	" 9, 1894	1,460.95
Wells-Stone Mercantile Co	" 11, 1894	1,293.61
William E. Richardson	" 12, 1894	31,389.59
Nat'l Bank of Redemption	Oct. 15, 1894	5,545.07
Lime Rock Nat'l Bank	" 17, 1894	5,446.38
Orrin D. Kinney, Jos. Sellwood	" 25, 1894	90.50
D. A. Wheeler	Nov. 3, 1894	5,736.40
Nat'l Bank of Redemption	" 23, 1894	5,592.63
Wm. G. Heinman	March 11, 1895	3,134.04
Wilson G. Crosby, Receiver	" 27, 1895	500.00
1st Nat. Bank Madison, Wis	" 16, 1895	3,636.37
Marine National Bank	June 18, 1895	4,029.47
William Plankington, Assignee	July 18, 1895	3,050.74
Hudson Wilson	Aug. 24, 1895	2,282.57
Frank Crassweller	Sept. 14, 1895	1,986.21
Frank Crassweller	" 14, 1895	2,926.75
John M. Williams	June 21, 1895	160,827.00

And it is further ordered and adjudged, that the following described judgments were, on said 24th day of June, 1896, on file and of record in said court, against the said plaintiff, George A. Elder, viz:

	Judgment creditor.	Date of docketing.	Amount.
67	Don A. Dodge	Oct. 6, 1893	$260.84
	Nat'l Bank of Commerce	Jan. 3, 1894	1,730.50
	Eliza Hart	Jan. 9, 1894	1,684.84
	Wilson G. Crosby, Receiver	March 26, 1895	100.00
	Marine National Bank	Aug. 17, 1895	3,996.66
	Nat'l German American B'k St. Paul	Aug. 18, 1894	2,723.83
	1st National Bank of Duluth	Sept. 18, 1894	2,287.05
	Josiah Wolf and others	Sept. 1, 1894	5,296.96
	1st Nat'l Bank of Newark	July 24, 1895	3,771.20
	Mack & Nye	Oct. 31, 1894	28,894.16

And it is further ordered and adjudged, that the said premises consist of two hundred forty (240) acres of land, that the same are vacant and unoccupied, and are not suitable for agricultural purposes, having no tangible value for any purpose, other than prospective mineral purposes; and that all of said premises have a value based upon the prospective discovery of minerals of not to exceed the sum of twelve hundred dollars ($1200).

And it is further ordered and adjudged, that a partition of said premises cannot be made without prejudice to the owners and parties interested therein, and that said premises be sold at public auction, to the highest bidder for cash.

68 And it is further ordered and adjudged, that William D. Underhill, of the City of Duluth, act as referee of this court, for the purpose of making a sale of said premises, and that said referee make a sale of said premises at public auction to the highest bidder for cash, upon notice published in the manner required for the sale of real estate on execution.

And it is further ordered and adjudged that as soon as said referee has made said sale of said premises, he shall make a report to this court of his proceedings therein.

And it is further ordered and adjudged that the plaintiff do have and recover his costs and disbursements in the sum of $331.57, and that the total amount of said costs and disbursements shall be partitioned among the said several owners of said premises, in the proportion of their several interests therein.

And it is further ordered and adjudged that upon the coming in of the report of said referee and upon the confirmation of said sale by the court, that the proceeds of the sale of said property shall be applied and distributed under the direction of the court.

Witness the Honorable S. H. Moer, Judge of the District Court aforesaid, at Duluth, this 5th day of May in the year of our Lord, 1899.

[SEAL.]

GEORGE F. CHESTER, *Clerk*,
By A. J. TAYLOR, *Deputy Clerk*.

69 March 1st, 1900. By order of the court filed this day, the above judgment is hereby amended as follows: "That on said 24th day of June, 1896, said defendant Poca Iron Company was a corporation, created and existing under the laws of the State of Minnesota and was on said day the owner in fee of an undivided 2/5 interest in and to said premises" and not the "undivided 1/5 thereof" as recited and set forth in paragraph 4 on page 3 of this judgment. That the foregoing take the place of said paragraph 4 on said page three and stand as correct as the fact is, as shown by the pleadings and proofs in said action.

[SEAL.] GEORGE F. CHESTER, *Clerk*,
By A. J. TAYLOR, *Deputy*.

Filed in my office at — o'clock — M., May 5, 1899. George F. Chester, Clerk of District Court, by A. J. Taylor, Deputy.

Memorandum.

Three cases numbered respectively 26205, 26228 and 26229, were tried and argued together. Some of the questions involved are common to the three cases, and some are applicable to one or two of them only. This memorandum will be concerned with a discussion of all the questions and may be considered in any if the cases so far as applicable therein.

Two principal questions must be considered. They are,

70 First. Are the judgments in the partition proceedings now subject to collateral attack because in those cases sales of the premises were ordered?

Second. In the partition case of Elder vs. Mesaba Land Company, et al., file No. 11714, did the court acquire jurisdiction to enter judgment against Albert B. Geilfuss, Assignee?

1. As to the present binding effect of the judgment in the partition cases.

These judgments are now being collaterally attacked. The claim of defendants is that the court had no jurisdiction originally to enter such judgments as were entered, and that therefore they are subject to such attack.

These judgments are now binding.

(*a*) If the determinations of the Court as set forth in the judgments were in law correct; or,

(*b*) If the question upon which the claim of invalidity is based was one which naturally or necessarily arose in the progress of the case and was one which was necessarily submitted to and considered by the court. Under such conditions, the determination, even if incorrect, was binding and conclusive unless reversed on appeal.

In those cases certain undivided interests in the property involved were encumbered in amounts exceeding the value of the entire property as shown by the records themselves, while other inter-

71 ests were wholly unencumbered. A division of the property could not well be made, and the Court directed and confirmed a sale thereof in each case.

Defendants claim that under Section 5782 General Statutes 1894, the judgments directing and confirming such sales were wholly unauthorized and beyond the jurisdiction of the court, and that they are therefore void and subject to this attack.

The right to partition of real estate has long been regarded as almost an absolute right under the law. That means of being relieved from the burdensome conditions atending the ownership of property in common has long been accorded. The right to a sale under certain conditions is but supplemental to the relief originally available. While therefore, that relief is statutory, the statute must be given reasonable construction so as to effectuate the purpose intended.

Plaintiffs claim that Section 5782 applies only when the entire interest in the property is encumbered by liens exceeding the value thereof. Defendants claim that if any interest, however small, is subject to a lien exceeding in amount the value of the entire property, the statute applies. What is the true legislative intent? Did the legislature mean that if any interest, however small, is encumbered beyond its value, there can be no partition? Or did it mean that if any interest, however small, is encumbered beyond the value of the entire tract involved, no partition may be had? Or
72 did it mean that to prevent a partition the entire tract must be covered by encumbrances which rest upon the tract as a whole and exceed the value thereof? Or did it mean that if there are separate encumbrances upon undivided interests and the sum total exceeds the value of the tract, there can be no partition whether some of the interests are nearly clear of encumbrances or not? Or did it mean that if there are separate encumbrances on undivided interests partition may still be had unless each interest is encumbered far more than its value?

If the construction contended for by defendants shall prevail, little would be left in such cases of the right to partition so long recognized and established. While if the construction contended for by plaintiffs is correct, we are led logically to the conclusion that there may be partition in any case where any fractional interest, however, small, is not encumbered beyond its actual value.

If a particular interest should be encumbered for more than its worth, there would be reason in a rule which would deny to the owner thereof the right to institute proceedings for partition. If the entire property should be subject to one or more liens exceeding the value of the property and covering the entire tract, or if each interest should be encumbered by a separate lien exceeding the value of such interest, there would be reason in a rule which
73 would deny to any owner the right to institute partition proceedings. But how in reason may an excessive encumbrance on one interest, that is, an encumbrance exceeding the value of such interest, reach over to and affect any other interest or the right of the owner thereof? It is not and cannot be a lien thereon, or in any way affect the title thereto.

A particular interest may be encumbered beyond its value, and to that extent is a case made out bringing the entire tract under

the operation of Section 5782 General Statutes 1894. If it can be shown that all the other interests are similarly encumbered, the application of the statute would be complete. But if any particular interest—a fourth or a fifth—is shown to be encumbered for four or five times its value, how can that by any reasonable intendment affect the other interests which are clear? For the purposes of Section 5782 (supr-), in considering any particular undivided interest how can we concern ourselves with any excess of encumbrance above the value of such interest? As to the owner of that interest there is reason for denying a right of partition, but the excess of encumbrance thereon cannot effect any of the other interests. Why should it in any wise affect the right of the owner thereof to pray for a partition?

The various conditions above referred to, and others which may be suggested, were probably not all present in the legislative
74 mind when the statute was enacted, and when an attempt is now made to apply the statute to such conditions a real difficulty is encountered.

There are good grounds for urging and relying upon the proposition that the determination- of the Court in the partition cases were correct, and that the lands there involved were not encumbered beyond their value within the meaning of Section 5782.

In my opinion, however, the second point is still more satisfactory upon which to rest the determination of this branch of the case. It is entirely clear that at some stage of the partition proceedings in each case the Court was bound to consider and determine whether it was dealing with conditions where a sale was authorized. In each case a sale was prayed for in the pleadings. The Court was bound to consider and determine the effect and meaning of Section 5782. As bearing thereon the foregoing discussion, and much more, would have been pertinent. If one view should be adopted and one construction given, no sale could be ordered. If another view and another construction should obtain, a sale might be had. The Court in each case determined that a sale was proper. In my opinion that determination is now beyond successful attack. That there was a substantial question to determine in the construction of Section 5782 is apparent from the foregoing and from much which might be added thereto. The question was not formal
75 merely and manifestly bound to be determined in one way only. In the partition cases here under consideration the Court was not only authorized but was bound to consider and determine the question above referred to.

The determination of any question concerning which the Court has jurisdiction, and whether the decision be correct or not is final and conclusive unless reversed on appeal.

The fundamental considerations upon which this rule is based, and which illumine the rule itself are found in:

Voorhees vs. U. S. Bank, 10 Peters, 449, at page 475.
Grignon's Lessee vs. Astor, et al., 2 Howard, 343.
See also Manson vs. Duncanson, 166 U. S. 545 to 548, inc.
Cornett vs. Williams, 20 Wall., at page 249.

Whether any particular action of a court is or is not within its jurisdiction depends upon whether or not in the particular case the Court was authorized to consider and determine the question involved in such action. When a case belongs to a class which the Court has power to hear and determine, and its authority has been properly invoked, it is authorized to hear and determine
76 every question which necessarily or properly arises in the course of the hearing and disposition of such case.

The foregoing language is not quoted from the authorities, but is believed to be a fair general statement of the rule deducible therefrom. A perfect reconciliation of all the statements in even the well considered cases is not possible. The courts approach the question of jurisdiction from various view points, and language which is correct when used in connection with one phase of the question may not be precisely so when applied to another.

"Jurisdiction of the subject matter," means not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular question the Court assumes to decide.

Sache vs. Wallace, 101 Minn., 172.

As already indicated, the test is not whether the particular question is determined correctly. The test is whether the Court is authorized to enter upon the consideration of the question and to determine the same at all. The rule is the same when the question involves the construction of a statute.

Kretsinger vs. Brown, 165 Fed. 612.

77 This must be kept in mind when considering expressions of the Court in particular cases to the effect that proceedings in violation of statutory rules or prohibitions are absolutely void. Cases involving real questions of statutory meaning or construction are not forever open to re-examination in any court at any time any more than are other cases.

It may be conceded that if the court should grant relief which was clearly beyond its authority and concerning which no question could reasonably be raised and therefore where no litigant could be heard to urge that the court had considered the question at all—when it was apparent that the court had acted blindly or in direct open violation or defiance of a law which in express terms limited and controlled its powers—it would then be acting without jurisdiction and such action would be void.

Sache vs. Wallace, 101 Minn. at page 172, top of page.

But every disregard or violation of the law does not involve the jurisdiction of the court.

"If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed, the plain provisions of the law, which gave them the power to hear and determine the case before

78 them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error.

Grignon's Lessee vs. Astor et al., 2 Howard, page 341.
McNitt vs. Turner, 16 Wall. at page 366.

A careful general statement based upon and drawn from a large number of authorities is found in Foltz vs. St. Louis 60 Fed. 316, at page 318. This statement serves a double purpose. It declares the rule as to when and of what questions the court has jurisdiction and also the rule as to the conclusive effect of decisions even though erroneous when made by the court within the exercise of its authority. The statement is as follows:

"Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question and to determine whether or not they are sufficient to invoke the exercise of that power. It is confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue
79 within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud." This language has been quoted and approved in:

Board of Commissioners vs. Platt, 79 Fed. 567.
Kretsinger vs. Brown, 165 Fed. 612, at page 615.

The decision in the latter case was written by Judge Van Devanter.

The following language quoted from Board of Commissioners vs. Platt (supra) applies in the case at bar to the partition proceedings:

"It was its right and its duty to determine these questions, and it did so. If its decision was erroneous its judgment could be reversed on appeal; but its determination of the question which the plaintiff in error is seeking to re-try in this case, was the exercise by that court—and the rightful exercise—of its jurisdiction; and whether its decision be right or wrong, it cannot be successfully attacked in this collateral proceeding."

Under the foregoing decisions the determination of the Court in the partition proceedings, as to whether it was proper to order
80 sales of the lands involved therein, is now binding and conclusive upon the parties to such proceedings, and, under both the statute and the general rules of law, upon those claiming under them.

Nothing in Sache vs. Wallace, 101 Minn., is at variance with this conclusion. In that case the trial court granted relief which it was not invited nor authorized to consider or grant. It was not a question of error. The court considered a matter which was not submitted to it at all. If the judgment in that case had been allowed to stand it

would have amounted to the perpetration of a fraud under the forms of law. The point decided in that case was that the court had no authority to grant the relief against which objection was there made. The granting of such relief was beyond the jurisdiction of the court in that particular case.

2. In the partition case of Elder vs. Mesabe Land Company, et al., did the judgment affect the rights of Albert B. Geilfus, assignee?

In case No. 8015 judgment was entered against John McKinley and in favor of Albert B. Geilfuss, assignee. In the judgment docket of said case the name of the plaintiff was written "Albert Geilfuss, assignee." In the partition suit of Elder vs. Mesaba Land Company, et al., No. 11714, neither of these names appear among the defendants, but the name of "Albert Guilfuss, assignee," does ap-
81 pear. An attempt was made to serve the summons in said action upon said defendant by a publication thereof and by mailing a copy of such summons to "Albert Guilfuss, assignee," at Milwaukee, Wisconsin, which was said to be his place of residence. The question is whether or not Albert B. Geilfuss, assignee, and his successors in interest are bound thereby.

The interest of Albert B. Geilfuss, assignee, and the name in which he claimed the same, appear of record. Prima facie that was the name under which he should be sued in reference to such interest. If that were the unvarying rule, it would be very simple, easily understood and easily applied. Where one's interest does so appear of record, even though it appears under a name which is not the true name, proceedings against the owner of such interest under such name are binding upon him.

Blinn vs. Chessman, 49 Minn. 140.

This is some argument in favor of requiring those who would proceed against one having such interest of record to take steps against him in the name which there appears.

The law, however, does not strain at trifles and will not hold a proceeding wholly void merely because of some trifling variation from the true name. The question is, has there been a substantial
82 variation from the true name of the defendant? If there has not, he will be bound. The rule as still further reduced is that if the true name and the name used sound substantially the same the defendant will be found. If the ear detects no substantial difference between the sound of the defendant's true name, as the same is usually pronounced, and the sound of the name by which he is sued, the defendant is bound. The final question therefore usually is, are the names idem sonans?

In our case of Lane vs. Innes, 43 Minn. 143, the true name was Beulah M. Plimpton. Suit was brought against her in that name, but in the summons as published, though not in the original, the name was spelled Berlah M. Plimpton. The case was not decided upon an application of the rule of idem sonans precisely, but upon the underlying principle that the difference between the names was not substantial, and that no one knowing the real defendant would be misled by the name as published; and it is said that this is apparent on placing the names in juxtaposition.

The case seems to have been determined from a consideration of how the two names appeared to the eye rather than how they sounded to the ear, and the decision was influenced somewhat by reason of the fact that the name was rather unusual, and therefore even with the change of a letter was not likely to be mistaken or misunderstood. Generally speaking, however, the test is, are the names idem sonans.

83 Cases, either civil or criminal, where the defendant has been personally served or taken into custody, but under a wrong name, are of no special significance. Though in some of those cases there is reference to the rule of idem sonans, it is apparent that in no proper sense is the matter refined or reduced to that point. In those cases the defendants had actual knowledge. They were actually touched in some way by the proceeding, and the question in a general way was whether they should know, notwithstanding the error in the name, that they were the persons intended. Considerable variance in names may therefore exist in such cases without invalidating the proceedings and not all of them can be upheld by an application of the rule of idem sonans.

The case at bar belongs to a class where, so far as shown, the defendant is proceeded against wholly without his knowledge and where it is attempted to affect his interests against his will, and without his consent. The actor sought to avail himself of the statutory provision allowing service of the summons by publication and no other service or notice was had. The cases of any real value here are those involving the service of the summons or other notice by publication only.

Interesting and instructive discussions in which this point is emphasized may be found in:

84 Thornilly vs. Prentice 121 Iowa 89.
Schoenfeld vs. Brown (Mich.) 123 N. W. 537.
Turner vs. Gregory, 151 Mo. 100.

In this case the question in this connection is whether the names "Albert Geilfuss" and "Albert Guilfuss" are idem sonans. The discussion will not cover the omission of the middle initial letter "B" for the reason that it does not seem necessary so to do.

Where the names involved are of foreign origin and retain in some measure their foreign pronunciation, courts very generally take notice thereof in determining what the real sound of the name is as generally pronounced and whether the two names are idem sonans.

Hubner vs. Reickhoff, 103 Iowa 368.
Metz vs. McAvoy Brewing Co., 98 Ill. App. 592.
State vs. Timmens, 4 Minn., at page 247 (Gil).

"Geilfuss" is very evidently a German name. As such it must be pronounced with the long sound of "i." Practically all surnames beginning with the letters "Gei" are so pronounced. None is pronounced with the short sound of "i." It happens that there
85 was a Swiss historian of German parentage named "Geilfuss." His name is pronounced with the long "i." On the other

hand, the name "Guilfuss" would necessarily be pronounced with the short sound of "i." The syllable "guil" is practically always so pronounced in all kinds of words. The only exceptions are certain words imported from the French or other languages, where the original foreign pronunciation is retained, but those pronunciations are not applicable here, and if they were they would be disastrous to plaintiffs' claim of idem sonans.

The difference between the sound of long "i" and short "i" is sharp and distinct; plainly and more marked, for instance, than the difference between the "a" and long "e" or between short "e" and short "u."

We have, then, the two names with distinctly different vowel sounds—"Geilfuss" with long "i" and "Guilfuss" with short "i." Are they idem sonans?

"Keisel" with long "i" and "Keesel" with long "e" are not idem sonans.

Huebner vs. Reickhoff, 103 Iowa, 368.

"Dunton" and "Denton" are not idem sonans.

Schoenfeld vs. Bourne, (Mich.) 123 N. W., 537.

"Leane," pronounced with a long "e" and "Lane" are not idem sonans.

86 Gear vs. Missouri Lumber Co., 134 Mo. 85.

In each of these cases the only difference in the names consists in the pronunciation of the vowel sound in one of the syllables. In the first case the difference is perhaps slightly greater than in the caes at bar, and in the others it is less.

In all of them the ear would readily detect the difference in sound between the names contrasted. In none of the cases, therefore, are the names idem sonans, and that is as true with respect to the names involved in the case at bar as with the names contrasted in the cases cited.

The omission of the middle initial "B" may or may not of itself be of controlling importance, but may fairly be considered with the change in the vowel sound of the name involved.

If the foregoing be correct, it then follows that the judgment in the partition case of Elder vs. Mesaba Land Company, et al., case No. 11714, was not binding or conclusive upon Albert B. Geilfuss, assignee.

At this point we are introduced to the third important question in the case.

The Geilfuss judgment was entered on January 4, 1894, and docketed on January 5, 1894. The partition action No. 11714, affecting the McKinley lands, and in which it was sought to bind Geilfuss, was begun on November 8, 1895, and the lis pen-
87 dens therein was recorded on November 9, 1895. Judgment was entered in that action on May 5, 1899, and the sale of the lands involved therein by the referee appointed for that purpose was duly confirmed by order of court bearing date April 28, 1900. In October, 1901, the Geilfuss judgment was assigned to one

Timlin and by Timlin was assigned to one Buell. Under this judgment, and on December 30, 1901, Buell caused a large amount of lands belonging to the defendant, John McKinley, in said judgment to be sold at execution sale. All these lands were sold in one parcel and were purchased by the said Buell. The lands so sold included the undivided one-fifth interest now claimed by the defendant, Grannis, in case numbered 26205 and 26229, and other lands. During the year allowed for redemption from said sale the purchaser Buell made and delivered an instrument in the form of a quit-claim deed, but containing provisions peculiar to the instrument itself, whereby he transferred all his interest in the said lands now claimed by the defendant Grannis herein to certain parties, under whom plaintiffs in the action last above referred to now claim.

The Wells-Stone Mercantile Company, a corporation, was a party defendant in the partition action number 11714 and was bound by the judgment therein. At the time that action was commenced said corporation was a judgment creditor in a judgment which
88 had been previously entered in this court against the aforesaid John McKinley. During the pendency of the partition proceeding last above referred to, and on August 15, 1896, another judgment was entered in this court in favor of said Wells-Stone Mercantile Company and against the said John McKinley for the recovery of the sum of $563.46, the same being in case number 12280. On April 21, 1900, the judgment last referred to was assigned to Frank Hicks. This judgment being subordinate to the partition action number 11714 ceased to be a lien on the McKinley interest affected by the partition action upon the confirmation of the referee's report of sale therein, but it was a lien upon all or nearly all the other McKinley lands which were sold under the Geilfuss judgment on December 30, 1901. Within the proper time Hicks redeemed the lands sold under the Geilfuss judgment. There was no other redemption. Defendant Grannis claims under that redemption. His claim is that under Sections 5472 and 5475, General Statutes 1894, the effect of the redemption was to vest in the redemptioner the entire interest which was sold on execution, including the interest covered by the partition proceeding. Plaintiffs claim that the redemption did not cover the lands included in the partition proceeding, and in any event, it did not cover those lands which had been included in the instrument hereinbefore referred to as executed by Buell and under which, in part, plaintiffs claim.

89 The validity of these claims is the third important question for determination to which reference has been made. This is a question of statutory construction. What does the statute mean when applied to redemptions made under conditions similar to those in the case at bar? In my opinion this has been determined by the Supreme Court in such terms that the case at bar is ruled thereby. There is no fair and satisfactory ground of distinction to be made.

Martin vs. Sprague, 29 Minn. 53.
Willis vs. Jelineck, 27 Minn. 18.
O'Brien vs. Krenz, 36 Minn. 136.

These cases, and others, in effect hold that when one has a lien upon any part of the land which is sold in one tract at execution sale he may redeem all the land so sold, and that upon making such redemption he succeeds to all the rights which the purchaser acquired in and to all such land at such sale.

If this is the right of the junior lien holder under the law nothing which the purchaser at the execution sale may do can affect that right and the result necessarily reached in this case is that as against Hicks, who made the redemption, and his grantees, the quit-claim deed made by Buell and hereinbefore referred to is without
90 effect and the title of the defendant Grannis under the redemption is good.

The remaining question concerns the matter set forth in the supplemental complaints alleging compliance with Section 4315 Revised Laws, 1905, and the answers thereto.

There may be doubt as to whether this is such an action as that statute contemplates. Undoubtedly, however, as to the interests referred to in the supplemental complaints the only purpose of the original suits was to obtain an adjudication that the execution sale referred to in the supplemental complaints was invalid. The complaints did not so state in terms but such was their purpose. The statute should of course be liberally construed. Under my view of the case the execution sale was invalid and no redemption therefrom is necessary or can be made, and the money and bonds deposited with the Sheriff should be turned to the plaintiffs. Plaintiffs, however, have a redeemable interest if a redemption was necessary. They have taken all necessary steps to perfect their right to redeem if it shall be held that the execution sale was valid. The minor objections urged to the steps taken by plaintiff under Section 4315, supra, are not well founded.

Filed in my office at — o'clock — m. Oct. 4, 1911.
J. P. JOHNSON,
Cl'k Dist. Court.
By R. E. JOHNSON, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

91 ALBERT L. ORDEAN et al., Plaintiffs,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Motion for New Trial.

You will please take notice that at the Court House in the City of Duluth, in the County and State aforesaid, on the 11th day of November, 1911, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, before Hon. W. A.

Cant, one of the judges of said court, the plaintiffs in the above entitled action will move the court for an order vacating and setting aside the decision heretofore rendered in said action and granting to the said plaintiffs a new trial of said action for the following causes materially affecting the rights of said plaintiffs, to-wit:

1. Surprise occurring at said trial which could not have been prevented by ordinary prudence, which will more particularly appear from affidavits on file as hereinafter stated, copies of which are hereto attached and made a part hereof.

2. Material evidence newly discovered which with reasonable diligence could not have been found and produced at the trial,
92 which will more particularly appear from affidavits on file as hereinafter stated, copies of which are hereto attached and made a part hereof.

3. That the decision is not justified by the evidence.

4. That the decision is contrary to law in this that the decision of the court that the defendant Henry J. Grannis is the owner of the undivided one-fifth (1/5) of the land described in the complaint, is not sustained by the facts found by the court, or otherwise stated that the conclusions of law of the court in this case is not sustained or supported by the findings of fact of the court.

Said motion will be made and based on all of the files and records in this case, including findings of fact and conclusions of law of the court and the affidavits of Alfred Jaques, Albert B. Geilfuss, Carl F. Geilfuss, W. G. Crosby and W. H. Timlin, which are on file in the case of Robert B. Whiteside, et al., vs. Henry J. Grannis, et al., and copies of which affidavits are hereto attached, marked Exhibits 1, 2, 3, 4, and 5, and made a part hereof.

Dated Nov. 4th, 1911.

JAQUES & HUDSON,
JOHN G. WILLIAMS,
WILLIAM ELDER,
Attorneys for Plaintiffs.

93 EXHIBIT 1.

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN et al., Plaintiffs,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

STATE OF MINNESOTA,
County of St. Louis, ss:

Alfred Jaques being first duly sworn deposes and says, that he is one of the plaintiffs in the above entitled action and one of the attorneys of record for the plaintiffs in said action.

Further affiant says that the surprise of the plaintiffs occurring at

the trial of said action which could not have been prevented by ordinary prudence and which is referred to in the attached motion, occurred in this way, to-wit:

The title of the plaintiffs in the above entitled action was based upon a decree in partition of said premises which decree was entered in the case of George A. Elder vs. Mesaba Land Company et al., which action is referred to more particularly in the findings of the court in this case.

94 That Albert Guilfuss, Assignee, and Albert B. Guilfuss, Assignee, were defendants in said action, and that the jurisdiction of said defendants in said action was obtained by publication of summons therein in the usual way, said proper name of said defendants being spelled as above set forth. That the correct way to spell the proper name of said defendants is "Geilfuss," and that said "ei" in said name is pronounced as if it were long "i."

That the decision in this case that the defendant Henry J. Grannis is the owner of an undivided one-fifth of the land involved in this proceeding is based entirely upon the variance in the sound and appearance of "Guilfuss" and "Geilfuss."

That after the evidence was all in in said case and at the argument thereof, the plaintiffs were surprised to learn that it was claimed by counsel that the variance in the sound and appearance of "Guilfuss" and "Geilfuss" was such that no jurisdiction had been obtained over said "Geilfuss" by reason of the variance in the spelling of said name.

That affiant personally drew the papers and commenced said action, and that he, at the time of the commencement of said action, had no knowledge of any variance in the spelling of this name and had no knowledge thereof at any time until after the trial of this action.

95 That the plaintiffs were impressed with the idea that the sound and pronunciation of said names "Guilfuss" and "Geilfuss" would be the same according to American usage.

That affiant was personally acquainted with a family in Illinois of the name of "Guild" and lived in the same community as such family. That such family and the entire community in which they resided uniformly pronounced the "ui" in said name as if it were long "i," as in the words "guile," "guide," and "guise."

Affiant further says that it is a matter of common knowledge that Gov. Curtiss Guild of the State of Massachusetts and the people of Massachusetts pronounce the name as if the "ui" therein was long "i."

That mislead by these facts and by the fact that no evidence was introduced in this case as to how the proper name "Guilfuss" and "Geilfuss" should, as a matter of fact, be sounded or pronounced under American custom and usage, the plaintiffs were surprised by the claim that as a mater of fact "Guilfuss" and "Geilfuss" should be sounded or pronounced differently. That but for this surprise the plaintiffs could have introduced at the trial evidence as to the pronunciation of "Guilfuss" and "Geilfuss" according to usage and custom in America, as will appear from his affidavit and the affidavits of

Albert B. Geilfuss and Carl F. Geilfuss, copies of which are hereto attached.

96 That since the trial and decision of this action the plaintiffs have discovered that if given an opportunity they can prove by Albert B. Geilfuss the facts set up in his affidavit, a copy of which is hereto attached, which affidavit is hereby referred to and made a part hereof, and among other things, that many people, and especially Americans, pronounce his surname giving the "ei" therein the short sound of "i" as though it were spelled "Gilfuss," although himself and his family pronounce the "ei" in his name as if it were long "i," but this is most generally true among Americans until they become acquainted with him, when they usually adopt the same pronunciation which is used by affiant and his family; but that until they become acquainted with him Americans usually pronounce his name as though it were spelled "Gilfuss." Also, that if letters or other papers were addressed to said Albert B. Geilfuss and with his proper name spelled either "Guilfuss" or "Geilfuss" they would be certain to be delivered to him by the postoffice authorities and that they would be received by him under the full belief that he was the person for whom such letters or communications were intended. Also that if the said Albert B. Geilfuss saw published in any newspaper printed summons in any action with the name of the defendant, or one of the defendants therein, spelled either "Albert Guilfuss" or "Albert B. Guilfuss" that he would know that he was such party defendant.

97 Affiant further says that if permitted to do so plaintiffs can prove by Carl F. Geilfuss the facts set up in the affidavit of Carl F. Geilfuss, a copy of which is hereto attached and made a part hereof.

Affiant further says that if permitted to do so plaintiffs can prove by the testimony of W. H. Timlin, one of the justices of the Supreme Court of the State of Wisconsin, that as a matter of fact, notice of the pendency of the partition suit of George A. Elder vs. Mesaba Land Company et al., was received by him from Albert B. Geilfuss by him (Geilfuss) delivering to said Timlin the summons in said action that came to him (Geilfuss) through the mails.

For further particulars as to what can be proved by said W. H. Timlin, reference is made to his affidavit, a copy of which is hereto attached and made a part hereof.

Affiant further says that if permitted to do so plaintiffs will be able to prove by Wilson G. Crosby that W. H. Timlin, attorney for Albert B. Geilfuss, wrote to him to look into this partition suit and other partition suits with the view of appearing and answering. That he did so, and notified Mr. Geilfuss' attorney (Timlin) that he was ready to appear in said case and answer if desired. What plaintiffs can show by the testimony of Mr. Crosby is more

98 particularly set forth in the affidavit of Wilson G. Crosby, a copy of which is hereto attached and made a part hereof.

ALFRED JAQUES.

Subscribed and sworn to before me this 3rd day of Nov., 1911.

[SEAL.] T. T. HUDSON,
Notary Public, St. Louis Co., Minn.

My commission expires April 20th, 1914.

EXHIBIT 2.

STATE OF WISCONSIN,
Milwaukee County, ss:

Albert B. Geilfuss personally appeared, and after being first duly sworn says: that he now is and has been a resident of Milwaukee, Wisconsin, since 1854. That he was cashier of the Bank of Commerce of Milwaukee from 1870 to 1879. That he was City Treasurer of Milwaukee from 1880 to 1884, was cashier of the Commercial Bank of Milwaukee from 1885 to July 21, 1893, at which time the Directors of said Bank made an assignment to him for the benefit of creditors, and that he is now one of the Bank Examiners for the State of Wisconsin.

Affiant further says that he is the same party who, as assignee of the Commercial Bank of Milwaukee, and in the name of "Albert B. Geilfuss, assignee," obtained a judgment for the sum of $2854.02 against John McKinley in the District Court in St. Louis
99 County, Minnesota, on the 4th day of January, 1894, which was docketed in the name of "Albert Geilfuss, assignee" in said court January 5, 1894, and who also obtained a judgment in said court in the name of "Albert B. Geilfuss, assignee," against John McKinley for the sum of $2125.60 on or about the 10th day of January, 1894.

Affiant further says that he and his family pronounce his surname, which is spelled "Geilfuss" by sounding the "ei" in the name the same as long "i," giving the "ei" the sound of "ui" in Guile and Guide. That in addressing affiant and calling his name, many people, and especially Americans, pronounce his surname giving the "ei" therein the short sound of "i," as though it were spelled "Gilfuss." This is most generally true among Americans until they become acquainted with affiant, when they usually adopt the same pronunciation which is used by affiant and his family. Until they become acquainted with him, Americans usually pronounce his name as though it were spelled "Gilfuss."

Affiant further says that in receiving letters and other written communications, particularly from persons who are not acquainted with him, his surname in the address and also in the communication is frequently spelled "Guilfuss," sometimes "Gulfuss," sometimes "Gilefus," sometimes "Geilfus," and sometimes "Gilfuss," That in written communications from friends and acquaint-
100 ances his surname is generally spelled "Geilfuss."

Affiant further says that letters addressed with the given name of affiant prefixed to a surname, spelled in either of the ways above stated, followed by the words "Milwaukee, Wisconsin," are

very certain to be delivered to affiant. That any letters or written notice or other written communications addressed to "Albert Guilfuss, Milwaukee, Wisconsin," or "Albert B. Guilfuss, Milwaukee, Wisconsin," would be delivered to him and would be received by him under the full belief that he was the person for whom such letter, notice or communication was intended. That any letter or written notice or written communication addressed to "Albert Guilfuss, Assignee, Milwaukee, Wisconsin," at any time between the years 1893 and 1897 would have been received by affiant under the full impression and belief that he was the party for whom such letter, notice or communication was intended.

Affiant further says that if he saw published in any newspaper a printed summons in any action or proceeding with the name of the defendant or one of the defendants therein spelled either "Albert Guilfuss" or "Albert B. Guilfuss" that he would know and believe that he was a party defendant in such action or proceeding, and that said published summons was intended for him, and further says that if at any time since July 21st, 1893 he had seen printed
101 in any newspaper a summons in any action wherein the name of the defendant, or one of the defendants therein was spelled either "Albert Guilfuss, Assignee," or "Albert B. Guilfuss, Assignee," that he would know and believe that he was, in a representative capacity, a party defendant in such action, and that such published summons was intended for him.

This affidavit is made by affiant with the knowledge that the same is to be used on motions for a new trial in two certain actions now pending in the District Court in St. Louis County, Minnesota, in one of which Robert B. Whiteside et al. are plaintiffs, and in the other Albert L. Ordean et al. are plaintiffs.

ALBERT B. GEILFUSS.

Subscribed and sworn to before me this 25th day of Sept., 1911.
[SEAL.] C. F. GEILFUSS,
Notary Public, Milwaukee Co., Wis.

My commission expires Jan. 17, 1915.

EXHIBIT 3.

STATE OF WISCONSIN,
Milwaukee County, ss:

Carl F. Geilfuss personally appeared, and after being first duly sworn says, that he is a practicing attorney in the city of
102 Milwaukee, Wisconsin, and has been a resident of said city all his life. That his family usually pronounce the surname of the family name giving the vowels ei the long sound of i as in the word quite. This is generally the pronunciation given by the German people. Americans, however, until they become acquainted with the way the Geilfuss family pronounce the name are very apt to pronounce the name giving the ei therein the sound of short i as "Gilfuss," this pronunciation of the surname frequently occurs. Sometimes the name is pronounced by some people as though it were spelled "Gelfuss" giving the ei therein the short sound of e.

Affiant further says that he sometimes receives letters and other written communications with his surname spelled in the address and in the communication "Guilfuss" sometimes with it spelled "Gilfuss," sometimes "Gulfuss," and sometimes "Geilfus." Friends and clients who are acquaintances in letters usually spell the surname "Geilfuss," but strangers quite frequently spell it "Guilfuss."

Affiant further says that letters addressed with the given name of affiant prefixed to a surname spelled in either of the several ways above stated, followed by the words "Milwaukee, Wisconsin," are sure to be delivered to affiant; that any letters or written notice or written communication addressed to "Carl F. Guilfuss, Milwaukee, Wisconsin," would be delivered to affiant and would be received by him under the full impression and belief that such letter or
103 notice or communication was intended for him.

This affidavit is made by affiant with the knowledge that the same is to be used on motions for a new trial in certain actions now pending in the District Court in St. Louis County, Minnesota, in which Robert B. Whiteside et al. are plaintiffs.

CARL F. GEILFUSS.

Subscribed and sworn to before me this 11th day of September, A. D. 1911.

W. J. ZIMMERS, [SEAL.]
Notary Public, Milwaukee County.

My commission expires July 29, 1912.

EXHIBIT 4.

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN et al., Plaintiffs,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

104 ROBERT B. WHITESIDE, MARGARET SULLIVAN, ALFRED Jaques, Theodore T. Hudson, John G. Williams, Robert H. Doran, J. George Brosseau, Alice E. Butchart, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased, and Frank Woodman, Plaintiffs,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

STATE OF WISCONSIN,
County of Dane, ss:

W. H. Timlin personally appeared, and after being first duly sworn says, that he is a resident of Milwaukee, Wisconsin. That

during the year 1893 he was an attorney at law and one of the directors of the Commercial Bank of Milwaukee, Wisconsin; that Albert B. Geilfuss was the cashier of said bank. That during said year said bank suspended payments and he, affiant, procured the appointment of Albert B. Geilfuss as assignee of the bank under and pursuant to the laws of the State of Wisconsin. That prior to that time he had discounted the notes of John McKinley at said bank and endorsed and guaranteed the same and said notes so endorsed and guaranteed were among the assets of said bank at the time of the assignment. That he paid up the said notes, but the
105 nominal legal title thereto remained in the assignee. That he was attorney for the bank and also for the assignee, Albert B. Geilfuss, and had sole and full charge of the assignment matters. That he forwarded the said notes to McCordic & Crosby, attorneys at Duluth, Minnesota, for collection by suit in the name of Albert B. Geilfuss, assignee, and they took judgment thereon as follows: one judgment for the sum of $2854.02 in favor of Albert B. Geilfuss, Assignee, and against John McKinley under date of January 4, 1894, and one judgment of $2125.60 against said John McKinley in favor of Albert B. Geilfuss, assignee, dated the 10th day of January, 1894.

Affiant further says that he knew of the institution and pendency of the partition suit brought in November, 1895, by George A. Elder as plaintiff against the Mesaba Land Company, John McKinley, the Poca Iron Company and others to partition the Northwest quarter of the Southwest quarter of Section five (5), the Northeast quarter of the Southeast quarter and lots two (2), four (4) and five (5) of Section six (6), all in Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian in St. Louis County, Minnesota; that it was the custom of the assignee Geilfuss to turn over to him all legal matters pertaining to said assignment, including all summon-s, notices and other legal papers or process. That he had no way of learning of the institution
106 or pendency of this partition suit except from McCordic & Crosby or from Albert B. Geilfuss as assignee. That his recollection refreshed from copies of letters written to him by McCordic & Crosby is that he informed them rather than that they informed him in relation to said partition suit. That he has no exact or definite recollection as to how he obtained notice of this partition suit, but his impression, partly from recollection and partly argumentative, is that he obtained the information from Albert B. Geilfuss, assignee, who had received a summons and notice of object of action in the partition action. That from a letter written by McCordic & Crosby to him on the 25th day of February, 1896, he is satisfied that he wrote to said McCordic & Crosby in relation to said partition suit on the 24th day of February, 1896. That it is very difficult for him after this lapse of time to say that he recollects definitely any particular incident or transaction with respect to said Albert B. Geilfuss handing to him the summons or his informing him that he, Geilfuss, had received it, as most of his old files and records of that early date have been lost or destroyed. He does rec-

ollect that he knew of the partition suit and was informed in some way and his impression is that this information reached him through Albert B. Geilfuss delivering to him in the usual manner the notices or papers served upon him or received by him concerning that particular suit.

Affiant further says that there were other persons liable
107 over to him on these notes and he had other expectations of collecting them in whole or in part at Duluth by assignment to some subsequent judgment creditor and for this reason did not have any appearance entered in the partition suit for Mr. Geilfuss.

W. H. TIMLIN.

Subscribed aand sworn to before me this 27th day of October, 1911.

ARTHUR A. McLEOD, [SEAL.]
Notary Public, Dane County, Wisconsin.

My commission expires Sept. 5, 1915.

EXHIBIT 5.

STATE OF MINNESOTA,
County of St. Louis, ss:

Wilson G. Crosby personally appeared, and after being first duly sworn says, that he has resided in Duluth, Minnesota, since prior to the year 1893. That during the years 1893, 1894, 1895 and 1896, and for some time prior and also subsequent thereto, he was a member of the firm of McCordic & Crosby, which conducted a general law business in Duluth and St. Louis County, Minnesota.

That in the course of their general law practice and during the latter part of the year 1893, one W. H. Timlin then a practicing attorney residing in Milwaukee, Wisconsin, now an associate
108 justice of the Supreme Court of Wisconsin, sent to the said firm of McCordic & Crosby two certain promissory notes which John McKinley, then of Duluth, Minnesota, and others, were obligated to pay and which were of the assets of the Commercial Bank of Milwaukee, with instructions that suit be brought by McCordic and Crosby to enforce the payment thereof in the name of Albert B. Geilfuss, Assignee, who, as stated in said instructions, had been appointed assignee of said Commercial Bank of Milwaukee.

That pursuant to said instructions the firm of McCordic & Crosby instituted two actions in the District Court of St. Louis County, Minnesota, and obtained a judgment in one of them, which is file No. 8015 of the files of the office of the Clerk of the District Court in said St. Louis County, for the sum of $2,854.02, against John McKinley on the 4th day of January, 1894, which was docketed in said office on the 5th day of January, 1894, in favor of Albert Geilfuss, Assignee.

That in the other action a judgment for $2,125.60 was rendered and docketed in said court against John McKinley on the 10th day of January, 1894, in favor of Albert B. Geilfuss, Assignee.

Affiant further says that all instructions relative to said obligations and said judgment that were received by said firm of McCordic & Crosby were given by and came from said W. H. Timlin, and that from correspondence or information received subsequent
109 to the obtaining of said judgment affiant understood that the said W. H. Timlin was personally interested in or was the owner in fact of said two judgments.

Affiant further says that on the 25th day of Febru[illegible]y, 1896, said firm of McCordic & Crosby received a communication from said W. H. Timlin sent by him from Milwaukee, Wisconsin, calling attention to certain actions pending in the District Court in and for St. Louis County, Minnesota, which involved the Geilfuss judgments above mentioned, and which were brought for the partition of lands in which John McKinley had a 1/5 interest, with instructions to investigate the same and report. The judgments referred to by Mr. Timlin in his communication were said judgments against John McKinley in favor of Albert B. Geilfuss, Assignee, one for $2,854.02 and the other for $2,125.60; and that one of the partition suits he referred to therein was the action in partition in which George A. Elder was plaintiff and the Mesaba Land Company et al. were defendants, known as file No. 11714. We made the investigation and reported to W. H. Timlin confirming his intimation that the action was brought to partition land in which John McKinley had a 1/5 interest.

Affiant further states that the above two judgments in favor of Albert B. Geilfuss, Assignee, were the only judgments docketed in the District Court in St. Louis County, Minnesota, in which
110 the said W. H. Timlin had any interest which were involved in said partition action in File No. 11714.

WILSON G. CROSBY.

Subscribed and sworn to before me this 24th day of Oct., 1911.
[NOTARIAL SEAL.] T. T. HUDSON,
Notary Public, St. Louis Co., Minn.

My commission expires April 20th, 1914.

[Written on left margin of page:] Due service of the within notice of motion for a new trial admitted this 4th day of November, 1911.

H. J. GRANNIS,
Att'y for Defendants.

[Written on left margin of page:] Filed in my office at — o'clock — m. Nov. 4, 1911.

J. P. JOHNSON, *Cl'k Dist. Court,*
By R. E. JOHNSON, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Objection to Hearing of Motion for New Trial.

The motion of the plaintiffs in the above entitled action for a new trial thereof, dated November 4th, 1911, having been called
111 for hearing, the defendant Henry J. Grannis, before the hearing for argument of said motion for new trial, files this his objection to the hearing of said motion upon the ground that there is no settled case or bill of exceptions, showing the evidence which was received upon the trial of said action and the evidence in said action is not before the court and said motion is not based upon the evidence as contained in a bill of exceptions, settled case or otherwise and that the consideration and determination of the only questions which can be raised upon said motion for a new trial involve and require the consideration by the court of the evidence which was taken upon the trial of said action.

Dated November 25th, 1911.

HENRY J. GRANNIS,
Attorney pro se and Attorney for Defendant, Charles K. Dickerman.

[Written on right margin of page:] Filed in my office at — o'clock — m. Nov. 25, 1911.

J. P. JOHNSON, *Cl'k Dist. Court,*
By B. G. RILLING, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oli-
112 ver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Affidavit Opposing Motion for New Trial.

STATE OF MINNESOTA,
County of St. Louis, ss:

Henry J. Grannis, being first duly sworn, says that he is one of the defendants in the above entitled action and is attorney for both of the defendants in said action; that the trial of said action was commenced before the Honorable William A. Cant, one of the Judges of said court, on the 4th day of August, 1910, and at said trial the plaintiffs were represented by Mr. T. T. Hudson of the firm of Jaques & Hudson and by Mr. William Elder and the defendants were represented by this affiant; that the basis of plaintiffs' title, to the lands involved in this action, as developed by the evidence offered and received upon the trial of said action was a certain judgment in a partition suit, and the proceedings based thereon, which judgment was entered on the 5th day of May, 1899, a copy of which, Marked "Exhibit A," is attached to the findings herein; that at said trial said judgment was offered in evidence by the plaintiffs and was received over the objection of the de-
113 fendants that the same was not binding upon them, or either of them or either of their grantors or predecessors in interest; plaintiffs also offered in evidence, as a part of their case in chief, the return of the Sheriff of St. Louis County, attached to the judgment roll, dated November 15, 1895, showing that Albert Guilfuss, assignee, named as a defendant in said action, could not be found in St. Louis County, and in connection with the offer of said return of said Sheriff Mr. Hudson, the plaintiffs' counsel, used the following language: "I suppose your Honor this particular part is rather anticipating the defense somewhat and it will probably be rebuttal, but it is shorter to put it in at this time perhaps than as rebuttal."

That after the parties had finished putting in evidence in said action and in a certain other action tried at about the same time, an adjournment was taken for several days before the respective parties presented their arguments in said action and certain other actions to the court; that on or about the 10th day of September, 1910, the counsel for the respective parties made oral arguments in said action before the court and also submitted written briefs;

that upon said oral arguments and also in said written briefs, the counsel for the respective parties fully argued the question as to whether the name Albert B. Geilfuss, Assignee, in whose favor the judgment under which the defendant Grannis claims title was entered and the name Albert Guilfuss, Assignee, the party
114 named as defendant in the partition action and served by publication therein, were idem sonans and the counsel for the respective parties submitted citation of authorities to the court bearing upon said proposition; that at no time during the trial of said action nor during the argument thereof nor in their written briefs nor in any of the subsequent proceedings in said action nor at any time prior to the service of the notice of motion for a new trial herein did the plaintiffs' counsel, or any of them, make any claim or suggestion that they were surprised with reference to the testimony or the position which defendants' counsel took with reference thereto and at no time before the service of said notice of motion for new trial, was there any suggestion either to the court or to defendants' counsel of any desire on the part of the plaintiffs to offer any other or further evidence in said action.

Affiant further says that in the last part of January or early in the month of February, 1911, and prior to the 8th day of February, of that year, the said Judge, who tried said action, called the plaintiffs' attorneys and affiant to his chambers and stated to them that he had reached a decision in said action and had outlined a memorandum stating his reasons therefor and that as a part of his decision he had held in substance that no jurisdiction was obtained over Albert B. Geilfuss, Assignee, in said partition action, that he did not consider the names Albert B. Geilfus, Assignee and Albert Guilfuss, Assignee, idem sonans; that on said occasion plain-
115 tiffs' counsel did not make any claim of any desire or ability to submit any further evidence, but did claim that the grantor of the defendant Grannis had no right to redeem as a creditor having a lien from the sale upon execution issued upon the judgment in favor of said Albert B. Geilfuss, Assignee and against John McKinley; that at a later date the court heard arguments upon the last mentioned point.

Affiant further says that the first draft of the findings in this action was prepared by the plaintiffs' counsel and submitted to affiant sometime in the month or September last; that thereafter affiant prepared a draft of findings in said action, suggesting certain changes and a short time before the findings were finally signed by the court, the counsel for the plaintiffs and the affiant met at the Judge's chambers and presented their respective views with reference to the scope and wording of certain portions of the findings; that the plaintiffs' counsel stated to affiant that it was their intention to have the findings sufficiently full so as to permit a review of the case on appeal to the Supreme Court without the neecssity of settling a case or bill of exceptions in said action and affiant is of the opinion that this wish was communicated to the court; That the final draft of said findings was prepared by the plaintiffs' counsel and the same was submitted to the court for signature and signed

on the 3rd day of October, 1911, and that at the time of said
116 meeting in the Judge's chambers, a few days before the signing of said findings and at the time said findings were presented for signature, there was no claim or intimation on the part of the plaintiffs or their counsel that they had discovered any new or additional evidence or that they had been taken by surprise with reference to any evidence submitted or claims made in said action.

Affiant further says that Wilson G. Crosby is an attorney at law, residing at Duluth, Minnesota, and ever since the commencement of this action has maintained an office in said city of Duluth, at 604 First National Bank Building, the same floor upon which affiant's office is located and that since the commencement of this action, affiant has seen said Crosby in said First National Bank Building and elsewhere in said City of Duluth, on frequent occasions and that if the plaintiffs had desired any testimony from said Crosby at the trial of said action, his presence in court could easily have been procured.

HENRY J. GRANNIS.

Subscribed and sworn to before me this 25th day of November, 1911.

[SEAL.] ROLLO N. CHAFFEE,
Notary Public, St. Louis County, Minnesota.

My Commission Expires May 24, 1914.

[Written on lower left margin of page:] Filed in my office at — o'clock — m. Nov. 25, 1911.

J. P. JOHNSON, *Clk Dist. Court,*
By B. G. RILLING, *Deputy.*

117 STATE OF MINNESOTA,
County of St. Louis:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and The Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Order Denying Motion for New Trial.

A motion on behalf of the plaintiffs for a new trial in the above entitled action came on regularly to be heard before the court, Messrs. Jaques & Hudson and Mr. J. G. Williams, appearing for the plaintiffs in support of said motion, and Mr. H. J. Grannis appearing for the defendants in opposition thereto. The court having heard and considered the affidavits and the arguments of counsel and being

now fully advised in the premises, it is ordered that said motion be and the same hereby is denied.

118 At the time of said hearing the defendants objected to the consideration of said motion on the ground that no case or bill of exceptions had been settled in said case. In view of the determination made of said motion on its merits, but without expressing a settled conviction with reference to the objection itself, it is ordered that said objection be and the same hereby is overruled.

Dated December 5, 1911.

By the Court.

WM. A. CANT, *Judge.*

Memorandum.

To those who actually participated in the trial of the case at bar, there could not well be any element of surprise with respect to the questions which arose and which were determined by the court.

There is left the question of newly discovered evidence, and that will be considered and determined on its merits.

The affidavits with respect to the name Geilfuss relied upon by plaintiffs were evidently drawn and made in entire fairness, although it is likely that if Geilfuss were himself personally interested in the result of the action his statements would be somewhat more guarded. They probably state the matter as favorably to the

119 plaintiffs as was consistent with good faith. It cannot be unfair to the plaintiffs therefore if in disposing of the motion the matters set forth in those affidavits are taken as true.

We may then say that it is established that the true spelling of the name in question is Geilfuss; that the true pronounciation thereof is with the hard g and long i; that it is so written and so pronounced by Geilfuss himself and by his family and by his friends and acquaintances generally.

On the other hand we have this: that some people—many people it is said, and especially Americans pronounce the name wrong, giving the first syllable the short sound of i as though spelled Gilfuss. But as they become acquainted with Geilfuss they usually adopt the correct pronunciation and conform thereto. From those with whom he is unacquainted he receives communications in which he is variously addressed, but it is apparent from the forms which his name takes therein that there is no unanimity among strangers as to the pronunciation of the same. While it is said that many Americans pronounce it with the short sound of i, it is apparent that at least three distinct forms and pronunciations are in use as evidenced by Gilefus, Gilfus, and Gulfus. The mispronunciation of the name so far as it goes is mainly with those who do not know Geilfuss. Their mistakes must be of little importance

120 on this question. They have little or nothing to do with him and little occasion to use or speak his name. Surely any pronunciation based on their usage as opposed to the usage of those who know Geilfuss and have daily communication with him can have little weight. A great many people, excepting only those whose

names are very simple and practically incapable of malformation, can tell interesting stories of the ways in which their name is spoken and the various forms which it takes on in written communications.

Notwithstanding this popular indulgence a man is entitled to be sued by his true name and this is more emphatically so when the plaintiff relies upon substituted service only. Any variation must at least be idem sonans. Geilfuss had that right in the case in question, and the defendant Grannis, who stands in his shoes, may now insist thereon. The rights which Geilfuss had could not be taken from him except in the manner provided by law. Would the contention here be that because Geilfuss was at times incorrectly addressed as Gulfus, Gilfus, Gilefus, Guilfus, or Geilfus, he might be sued under any of such names? That cannot be so. It cannot be the rule that because some people or many people pronounce a man's name incorrectly, he may therefore be sued by the incorrect name. If the incorrect pronunciation had become well-nigh universal or recognized or in effect adopted by the person holding the name, the situation would be quite different. The pro-
121 nunciation would then no longer be incorrect. We have no such situation here. The name in question is not generally pronounced as if spelled Gilfus, but is so pronounced by a limited class of people only, and they have least occasion to use the name. The situation remains precisely the same as that considered in the memorandum attached to the findings herein—the man's name is Geilfuss, pronounced with the long i, not on odd occasions or by a few isolated people, but always so by himself and family and generally by all who know him. He was sued by the name Guilfuss which must be pronounced with the short sound of i. The question of whether or not such a variation is fatal in cases of substituted service by publication seems to be settled by the authorities cited in the previous memorandum. The suggestion that the spelling Guilfuss might be pronounced with the long i need not be considered. To begin with, there is no such name, and no usage with respect to the pronunciation thereof could be shown. How that supposed name should be pronounced if encountered is an academic question only. No pronunciation of the long i could be shown and no such showing is proposed. The theory of the motion is that Geilfuss is pronounced the same as if spelled Gilfuss and that the service by publication was sufficient because the defendant was by many people and especially by Americans who did not know him called Gilfuss.

122 The affidavits therefore are insufficient on their face to warrant a new trial. But if we draw on the available general stock of information as to the pronunciation by English speaking people of German names containing the diagraph ei we see how almost certain it is that the proof would fall short even of the affidavits. There seems to be no disposition whatever to anglicize such names so as to deprive ei of the long sound of i. In a very few cases and for special reasons the letters may take on the sound of long e. Those are palpable miscarriages. It would hardly be possi-

ble here. The combination of sounds indicated by g-e-l with hard g and long e is ill sounding and is particularly shunned in English speaking as any examination will disclose. The German ei degenerating into short i as claimed here is practically unknown so far as may be discovered by research. We have only to refer to names with which we are all familiar, some local and some not, to discover how very general the disposition is among English speaking people to perpetuate the German sound of ei, giving it long i wherever found in German names. Some of those names exemplifying this rule are as follows: Geiler, Geissler, Hein, Heim, Leiter, Klein, Keizer, Kelheim, Leibl, Leibnitz, Weiss, Weitzel, Reinhart, Reichert, Stein, Rhein, Meistersinger, Mannheim, Mannheimer, Holstein, Heinrich, Heinze, Freiburg, Fleischer, Fleischmann, Eichmann, Geist, Blenheim, Breittman.

123 Whether Geilfuss actually knew personally of the pendency of the partition action is left in a very hazy state by the evidence; but if the name set forth therein by which it is now sought to bind him was not his true name or a name idem sonans therewith, it is immaterial whether he had such knowledge or not. Where there is no personal service and no appearance in a case with respect to a person sought to be bound, the question of jurisdiction as to such person must be determined by the record and not by so uncertain a test as his subsequent statements concerning his knowledge or his lack of knowledge of the action. This memorandum may be considered as applying in case number 26205 and case number 26229.

Filed in my office at — o'clock — m. Dec. 5, 1911.

J. P. JOHNSON,
Cl'k Dist. Court,
By B. G. RILLING, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and The Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

124 *Judgment.*

This cause having been regularly placed upon the calendar of the above named court for the July 1910 general term thereof, came on for trial before the court, without a jury, on the 4th day of August, 1910, during said term, Jaques & Hudson, John G. Williams,

Esq., and William Elder, Esq., appearing as attorneys for the plaintiffs and Henry J. Grannis, Esq., appearing as attorney for the defendants; and the court having made and filed findings of fact, conclusions of law and order for judgment herein;

Now, therefore, pursuant to said findings of fact, conclusions of law and order for judgment and on motion of the attorneys for the respective parties, it is hereby adjudged and decreed that the plaintiffs, other than the plaintiff, Oliver Iron Mining Company, are the owners in fee simple of an undivided four-fifths (4/5) of the land described in the complaint, to-wit, lot two (2) of Section four (4), in Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian, in St. Louis County, Minnesota, in the proportions set forth in the complaint, to-wit: the plaintiff, Albert L. Ordean, an undivided nineteen-one hundredths (19/100) of said undivided four-fifths (4/5) interest, the plaintiff, Margaret Sullivan, an undivided one-fifteenth (1/15) thereof, the plaintiff,
Alfred Jaques, an undivided one-thirtieth (1/30) thereof, the
125 plaintiff, Theodore T. Hudson, an undivided one-thirtieth (1/30) thereof, the plaintiff, John G. Williams, an undivided one fortieth (1/40) thereof, the plaintiff, Alice E. Butchart, as executrix and trustee under the will of Ida Michaud, deceased, an undivided seven-two hundredths (7/200) thereof, the plaintiff, Christiana Alstead, an undivided seven-sixtieths (7/60) thereof and the plaintiff, Frank Woodman, an undivided one-half (½) thereof, and that the defendants have not, nor either of them, any right or title to, interest in or lien upon the aforesaid undivided four-fifths (4/5) interest in said land.

It is further adjudged and decreed that the aforesaid title of the plaintiffs in and to said undivided four-fifths (4/5) of said land, is subject to a certain mining lease executed by the plaintiffs herein, other than the plaintiff, Oliver Iron Mining Company, in favor of said Oliver Iron Mining Company, dated November 8th, 1902 and recorded December 31, 1902, at 9:30 o'clock A. M. in the office of the Register of Deeds in and for St. Louis County, Minnesota, in Book "X" of Agreements, at page 422, which lease is for the term of fifty (50) years from October 1, 1902, and, in terms, covers the whole of the above described premises and entitles the said Oliver Iron Mining Company to explore for, mine and remove from said premises the merchantable iron ore and other minerals, with the
right to cut and use all the timber, other than pine, necessary
126 for fuel and buildings and for drains, tramways, supports and shafts in mines or connecting the same with any railway, said Oliver Iron Mining Company to pay a royalty on iron ore of twenty-five (25c.) cents per gross ton, said lease also containing other provisions and conditions ordinary and usual in a mining lease.

It is further adjudged and decreed that the defendant Henry J. Grannis, is the owner in fee simple of an undivided one-fifth (1/5) of the lands in said complaint and hereinbefore described and that the plaintiffs have not, nor have any of them, any right or title to, interest in or lien upon said undivided one-fifth (1/5) interest, and

that said interest is not subject to the aforesaid mining lease and the defendant Grannis is not bound by the terms thereof.

It is further adjudged and decreed that the judgment heretofore docketed in the office of the clerk of this court on the 9th day of February, 1900, in favor of Charles E. Dickerman and against George A. Elder, was not a lien upon the interest of George A. Elder in the lands hereinbefore described and that the execution sale thereunder is invalid and void and that the plaintiffs are entitled to receive from the Sheriff of said County of St. Louis the money and bond deposited with said Sheriff under Section 4315 of the Revised Laws of Minnesota for the year 1905.

127 Witness the Honorable William A. Cant, Judge of the District Court aforesaid, at Duluth, this 27th day of December, in the year of our Lord one thousand nine hundred and eleven.

J. P. JOHNSON,
Clerk of said District Court,
[SEAL.] By R. E. JOHNSON, *Deputy.*

Filed in my office at — o'clock — m. Dec. 27, 1911.

J. P. JOHNSON,
Clerk Dist. Court,
By B. G. RILLING, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Please take notice, that the above named plaintiffs, and each and all of them, appellants, appeal to the Supreme Court of the State of Minnesota from that part of that certain judgment of the said District Court entered in said court in this case on the 27th day
128 of December, 1911, which adjudges that the plaintiffs are only entitled to an undivided four-fifths of the real estate in said judgment described, and that the defendant Henry J. Grannis is the owner of an undivided one-fifth thereof, and that the mining lease of the plaintiff Oliver Mining Company is not a lien upon said one-fifth, which part of said judgment is in language and figures as follows, to-wit:

"It is hereby adjudged and decreed that the plaintiffs, other than the plaintiff Oliver Iron Mining Company, are the owners in fee simple of an undivided four-fifths (4/5) of the land described in the complaint, to-wit: Lot two (2), of Section (4), in Township fifty-

eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian, in St. Louis County, Minnesota, in the proportions set forth in the complaint to-wit: the plaintiff Albert L. Ordean an undivided nineteen one-hundredths (19/100) of said undivided four-fifths (4/5) interest, the plaintiff Margaret Sullivan an undivided one-fifteenth (1/15) thereof; the plaintiff Alfred Jacques an undivided one-thirtieth (1/30) thereof; the plaintiff Theodore T. Hudson an undivided one-thirtieth thereof; the plaintiff John G. Williams an undivided one-fortieth (1/40) thereof; the plaintiff Alice E. Butchart as Executrix and Trustee under the will of Ida Michaud, deceased, an undivided seven two-hundredths
129 (7/200) thereof, the plaintiff Christiana Alstead an undivided seven sixtieths (7/60) thereof, and the plaintiff Frank Woodman an undivided one-half (½) thereof, and that the defendants have not, nor have either of them, any right or title to, interest in or lien upon the aforesaid undivided four-fifths (4/5) interest in said land.

It is further adjudged and decreed that the aforesaid title of the plaintiffs in and to said undivided four-fifths (4/5) of said land, is subject to a certain mining lease executed by the plaintiffs herein, other than the plaintiff Oliver Iron Mining Company, in favor of said Oliver Mining Company, dated November 8, 1902, and recorded December 1, 1902, at 9:30 o'clock A. M. in the office of the Register of Deeds in and for St. Louis County, Minnesota, in Book 'X' of Agreements, at page 422, which lease is for the term of fifty (50) years from October 1, 1902, and, in terms, covers the whole of the above described premises and entitles the said Oliver Iron Mining Company to explore for, mine and remove from said premises the merchantable iron ore and other minerals, with the right to cut and use all the timber, other than pine, necessary for fuel and buildings and for drains, tramways, supports, and shafts in mines or connecting the same with any railway, said Oliver Iron Mining Com-
130 pany to pay a royalty on iron ore of twenty-five (25) cents per gross ton, said lease also containing other provisions and conditions ordinary and usual in a mining lease.

It is further adjudged and decreed that the defendant Henry J. Grannis, is the owner in fee simple of an undivided one-fifth (1/5) of the lands in said complaint and hereinbefore described, and that the plaintiffs have not, nor have any of them, any right or title to, interest in or lien upon said undivided one-fifth (1/5) interest, and that said interest is not subject to the aforesaid mining lease and the defendant Grannis is not bound by the terms thereof."

Dated this 2nd day of January, 1912.

JAQUES & HUDSON,
JOHN G. WILLIAMS &
WM. ELDER,
Attorneys for Plaintiffs and Appellants.

Filed in my office at — o'clock — m. Jan. 3, 1912.

J. P. JOHNSON,
Clerk Dist. Court.
By R. E. JOHNSON, *Deputy.*

Due service of the within Notice of Appeal is hereby admitted this 3rd day of January, 1912.

H. J. GRANNIS,
Attorney for Defendants.
J. P. JOHNSON,
Clerk of District Court.

STATE OF MINNESOTA,
County of St. Louis:

District Court, Eleventh Judicial District.

131 ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

Notice of Appeal to Supreme Court.

GENTLEMEN: Please take notice that the above named defendants, and each of them, appeal to the Supreme Court of the State of Minnesota, from all that part and portion of the judgment of said District Court, entered in the above entitled action on the 27th day of December, 1911, wherein it is adjudged and decreed that the plaintiffs, other than the plaintiff, Oliver Iron Mining Company, are the owners in fee simple of an undivided four-fifths (4/5) of the land described in the complaint, to-wit, lot two (2) of Section four (4), in Township fifty-eight (58) North of Range seventeen (17) West of the Fourth Principal Meridian in St. Louis County, Minnesota, in the proportions set forth in the complaint, to-wit: the plaintiff Albert L. Ordean, an undivided nineteen-one hundredths (19/100) of said undivided four-fifths (4/5) interest, the
132 plaintiff, Margaret Sullivan, an undivided one-fifteenth (1/15) thereof, the plaintiff, Alfred Jaques, an undivided one-thirtieth (1/30) thereof, the plaintiff, Theodore T. Hudson, an undivided one-thirtieth (1/30) thereof, the plaintiff, John G. Williams, an undivided one-fortieth (1/40) thereof, the plaintiff, Alice E. Butchart, as executrix and trustee under the will of Ida Michaud, deceased, an undivided seven-two hundredths (7/200) thereof, the plaintiff Christiana Alstead, an undivided seven-sixtieths (7/60) thereof and the plaintiff Frank Woodman, an undivided one-half (½) thereof, and that the defendants have not, nor have either of them, any right or title to, interest in or lien upon the aforesaid undivided four-fifths (4/5) interest in said land, and that said undivided four-fifths (4/5) of said land, is subject to a certain mining lease executed by the plaintiffs herein, other than the plaintiff, Oliver Iron Mining Company, in favor of said Oliver Iron Mining Com-

pany, dated November 8th, 1902 and recorded December 1, 1902, at 9:30 o'clock A. M. in the office of the Register of Deeds in and for St. Louis County, Minnesota, in Book "X" of Agreements, at page 422, which lease is for the term of fifty (50) years from October 1, 1902, and, in terms, covers the whole of the above described premises and entitles the said Oliver Iron Mining Company to explore for, mine and remove from said premises the merchantable iron ore and other minerals, with the right to cut and use all the timber,
133 other than pine, necessary for fuel and buildings and for drains, tramways, supports and shafts in mines or connecting the same with any railway, said Oliver Iron Mining Company to pay a royalty on iron ore of twenty-five (25c.) cents per gross ton, said lease also containing other provisions and conditions ordinary and usual in a mining lease.

You will further take notice that the above named defendants, and each of them, also appeal to said Supreme Court from that part and portion of said judgment wherein it is adjudged and decreed that the judgment heretofore docketed in the office of the clerk of said District Court, on the 9th day of February, 1900, in favor of Charles E. Dickerman and against George A. Elder, was not a lien upon the interest of George A. Elder, in the lands hereinbefore described and that the execution sale thereunder is invalid and void and that the plaintiffs are entitled to receive from the Sheriff of said County of St. Louis, the money and bond deposited with said Sheriff under Section 4315 of the Revised Laws of Minnesota, 1905.

Dated January 2nd, 1912.

Respectfully,

H. J. GRANNIS,
Attorney for Defendants.

To Jaques & Hudson, John G. Williams, and William Elder, Attorneys for Plaintiffs, and to J. P. Johnson, Clerk of
134 said District Court.

Due and personal service of the within Notice, by copy, at Duluth, Minn., is hereby admitted this 6th day of January, 1912.

JAQUES & HUDSON,
JOHN P. WILLIAMS AND
WILLIAM ELDER,
Attorneys for Plaintiffs.
J. P. JOHNSON,
Clerk of District Court.

Filed in my office at — o'clock — m. Jan. 6, 1912.

J. P. JOHNSON,
Cl'k Dist. Court.
By R. E. JOHNSON, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Plaintiffs,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants.

135 Whereas, on the 27th day of December, 1911, judgment was entered and docketed in the above entitled action, and

Whereas, both the plaintiffs and the defendants in said action have appealed, or are about to appeal, from said judgment, or from some part or parts thereof,

Now therefore, it is hereby stipulated and agreed that the requirement of the statute for an Appeal Bond in case of an appeal is hereby mutually waived by all of the parties to the above entitled action, and that none of the parties to said action who have appeale, or may hereafter appeal from said judgment, shall be required to make or file an appeal bond, and it is further agreed and stipulated that all proceedings in the above entitled court in said action shall be stayed until the final determination of said action shall be made by the Supreme Court of the State of Minnesota upon the appeals of the respective parties.

Dated January 2nd, 1912.

JAQUES & HUDSON,
JOHN G. WILLIAMS &
WILLIAM ELDER,
Attorneys for Plaintiffs.
H. J. GRANNIS,
Attorney for Defendants.

Filed in my office at — o'clock — m. Jan. 3, 1912.
J. P. JOHNSON,
Cl'k Dist. Court,
By R. E. JOHNSON, *Deputy.*

136 *Clerk's Certificate.*

District Court, Eleventh Judicial District.

STATE OF MINNESOTA,
County of St. Louis, ss:

I, J. P. Johnson, Clerk of the District Court, St. Louis County, and State of Minnesota, do hereby certify that I have compared the foregoing papers writing with the original Complaint, Separate An-

swer of Defendant, Henry J. Grannis, Separate Answer of Defendant, Charles K. Dickerman, Reply to Separate Answer of Henry J. Grannis, Reply to Separate Answer of Defendant Charles K. Dickerman, Supplemental Complaint as to Extension of Time to Redeem, Answer to Supplemental Complaint, Findings of Fact and Conclusions of Law, Notice of Motion for New Trial, Order denying Notice of Motion for New Trial, Judgment of Trial Court, Notice of Appeal of Plaintiffs, Notice of appeal of Defendants, Stipulation waiving bond on Appeal, in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original papers and the whole thereof.

Witness, My hand and seal of said Court, at Duluth, this 20th day of February, A. D. 1912.

[SEAL.]

J. P. JOHNSON, *Clerk*,
By P. C. SUNDLEY, *Deputy*.

137 State of Minnesota Supreme Court, April Term, A. D. 1912. Albert L. Ordean, et al., Appellants and Respondents, vs. Henry J. Grannis and Charles K. Dickerman, Appellants; Henry J. Grannis, Respondent. Assignments of Error of Plaintiffs on appeal. Jaques & Hudson, John G. Williams, and William Elder, Attorneys for plaintiffs and appellants. Filed Mar. 13, 1912. I. A. Caswell, Clerk.

138 *Assignments of Error.*

The trial court erred:

1. In finding and deciding that the court in the petition suit acquired no jurisdiction of the defendants therein, Albert Geilfuss, Assignee, and Albert B. Geilfuss, Assignee, for the reason that such finding and decision is not justified by the facts found by the court.

2. In finding and deciding as a conclusion of law that the plaintiffs other that the plaintiff Oliver Iron Mining Company were the owners of only an undivided four-fifths of the premises involved, for the reason that such conclusion is not justified by the facts found by the court and that the facts found by the court justify the conclusion or decision that the plaintiffs, other than the plaintiff Oliver Iron Mining Company, are the owners of the entire premises, subject to the mining lease of the plaintiff Oliver Iron Mining Company.

3. In finding and deciding that the defendant Henry J. Grannis is the owner of an undivided one-fifth of the premises involved, for the reason that such finding and decision is not justified by the facts found by the Trial Court.

4. In finding, deciding and ordering that a judgment should be entered adjudging that the plaintiffs, other than the plaintiff Oliver Iron Mining Company, are the owners of only an undivided four-fifths of the premises involved, for the reason that the facts found by the court do not justify the judgment.

5. In finding, deciding and ordering that judgment should be

entered adjudging that the defendant Henry J. Grannis
139 is the owner of an undivided one-fifth of the premises involved, for the reason that such judgment is not justified by the facts found by the court.

6. In overruling the motion of the plaintiffs for a new trial, for the reason that the facts found by the court do not justify the decision of the court thereon or the judgment ordered by the court.

7. In entering judgment in the District Court for St. Louis County adjudging that the plaintiffs were the owners of only an undivided four-fifths of the premises involved instead of the whole thereof, for the reason that the facts found by the court do not justify or sustain said judgment.

8. In entering judgment in the District Court for St. Louis County adjudging that Henry J. Grannis is the owner of an undivided one-fifth of the premises involved, for the reason that the facts found by the court do not justify or sustain such judgment.

JAQUES AND HUDSON,
JOHN G. WILLIAMS,
WILLIAM ELDER,
Attorneys for Plaintiffs (Appellants).

140 17552. State of Minnesota Supreme Court. Albert L. Ordean, et al., Respondents-Appellants, vs. Henry J. Grannis, et al., Appellants-Respondents. Opinion and Syllabus. Filed June 7, 1912. I. A. Caswell, Clerk. Bunn, J.

141 **17552.**

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

No. 120.

ALBERT L. ORDEAN et al., Respondents-Appellants,
vs.
HENRY J. GRANNIS et al., Appellants-Respondents.

Syllabus.

1. Where summons is served by publication and there is an error in the name of a defendant, though the true name and the name given be not strictly idem sonans, if the names when printed look substantially alike to the eye, and it appears that neither defendant or those who knew him could be misled by the difference, judgment by default rendered on such service is valid as against collateral attack.
2. Applying this rule, it is held, where the true name of defendant was "Albert B. Geilfuss, Assignee," and the name as published was "Albert Guilfuss, assignee," the difference between the names, each considered as a whole, was not such a defect as rendered the judgment void.

3. Where a court has jurisdiction of the subject matter and the parties, *as* renders a judgment which it had jurisdiction to enter if the facts pleaded and proved warranted it, such judgment, though eroneous under the pleadings and proof in the case, is not void, and cannot be attacked collaterally. This rule applied to a decree of sale in a partition action, though it may have been erroneous under G. S. 1894 Sec. 5872, because the liens on the property exceeded in amount its value.

Reversed, with directions on appeal of plaintiffs.
Affirmed on appeal of defendants.

142 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912, No. 120.

17552.

ALBERT L. ORDEAN et al., Respondents-Appellants,
v.
HENRY J. GRANNIS et al., Appellants-Respondents.

Opinion.

Plaintiffs brought this action to determine adverse claims to real estate in St. Louis County. The trial resulted in a judgment to the effect that plaintiffs were the owners of an undivided four-fifths interest in the land and defendant Grannis the owner of an undivided one-fifth interest. Plaintiffs appealed from this judgment, as did also defendants Grannis and Dickerman.

There is no controversy over the facts, which are fully stated in the findings, and may be briefly stated as follows:

November 8th, 1905, George A. Elder owned an undivided one-fifth interest in the land, Mesaba Land Company an undivided one-fifth, John McKinley an undivided one-fifth, and Poca Iron Company an undivided two-fifths. On or prior to this date there were docketed ten judgments against George A. Elder, and each was a lien upon his interest in the land. On or prior to November 8th, 1895, there were docketed some 47 judgments against John McKinley, and each was a lien upon McKinley's undivided interest in the land. Among the judgments against McKinley were two rendered in favor of Albert B. Geilfuss, assignee, one for $2,854.02, which was docketed in the judgment lien docket as in favor of Albert Geilfuss, assignee the other for $2,125.00, which was docketed as in favor of Albert B. Geilfuss, assignee.

November 8th, 1895, George A. Elder commenced a partition suit against the other owners of undivided interests in the land.

143 In this action all of the judgment creditors of Elder and of McKinley were made defendants, except that the name Albert Geilfuss, assignee, or the name Albert B. Geilfuss, assignee, did not appear in the summons or other files in the action. The

summons named Albert "Guilfuss," assignee, as a defendant. There was no personal service of the summons upon Albert B. Geilfuss, assignee, who was the real owner of the two judgments and resided in Milwaukee, Wisconsin. The summons was duly served by publication upon the defendant designated as Albert Guilfuss, assignee, a copy of the summons was addressed to said name at Milwaukee, Wisconsin. Neither "Geilfuss" or "Guilfuss' appeared in the action.

The complaint in the partition action described the interests of the parties and the liens on their interests, including the numerous judgments, and asked for a partition of the lands, or in case that could not be done, for a sale under the decree of the court. The trial resulted in a decision and judgment that the lands could not be divided, and ordering them sold by a referee to the highest bidder, the proceeds to be divided among the defendants according to their respective rights under the law. Thereafter the sale was made to August Schupp for $6,700, and duly confirmed by the court, and a deed executed and delivered to the purchaser. Plaintiff's title to the lands is derived by mesne conveyances from Schupp.

The judgment of Geilfuss, assignee, against McKinley for $2,854.02, was in 1901 assigned to F. L. Buell. Thereafter execution was issued on this judgment and levied on McKinley's one-fifth interest in the lands, which was sold to Buell, on the execution sale. Defendant Grannis succeeded by mesne conveyances to whatever title was acquired by Buell under this execution sale, and claims title to an undivided one-fifth interest in the lands by reason thereof. This claim the trial court sustained.

In 1900 Charles E. Dickerman recovered a judgment for $23,095.34 against George A. Elder in the district court of St. Louis County, which was docketed. Defendants Grannis and Dickerman became the owners of this judgment and in February 1910, the interest of Elder in the lands in controversy, if he had any
144 interest therein, was sold on execution sale under such judgment to the defendants Grannis and Dickerman, who claim a lien upon an undivided one-fifth interest in the lands by reason of this execution sale. This claim was not sustained by the trial court.

Upon the appeal of plaintiffs, but one question is involved. The trial court held that no jurisdiction was acquired in the partition suit over the judgment lien of Albert B. Geilfuss, Assignee. If this is correct, it is clear that the lien of his judgment on the McKinley interest was not affected by the decree in the action, and that the subsequent sale of that interest under execution on the judgment gave a good title thereto to the purchasers. If on the other hand, the court acquired such jurisdiction, the McKinley interest in the lands passed to the purchaser at the partition sale, and is owned by plaintiffs. This of course is on the assumption that the court had jurisdiction to decree a sale in the partition action, a question which will be determined in the decision on defendant's appeal.

The precise question is whether a service by publication on "Albert Guilfuss, assignee," gives the court jurisdiction to render a default judgment binding upon "Albert B. Geilfuss, assignee." The

difference in the name of the defendant served, and the name of the owner of the judgment liens sought to be affected by the action, are the difference between "Guil" and "Geil," and the omission of the middle initial. The learned trial court in an exhaustive and able memorandum, reached the conclusion that the names were not idem sonans and that the difference was fatal. The question is by no means free from doubt. The trial court's conclusion is largely based upon the pronunciation of "ei" as it appears in German names, and the pronunciation of "ui" as it appears in English words and proper names. It is evident that Geilfuss is a German name, and quite clear that it is pronounced with the lon*d* sou*l*d of i. Indeed an examination of the Century Cyclopedia of names fails to disclose a single proper name beginning with "Gei" that is not pronounced with the long sound of i. Examples are Geibel, Geierstein,
145 Geiger, Geiler, Geissler, Geisenheim. The name "Geilfuss" is apparently made up of the two German words "geil" and "fuss." On the other hand "Guilfuss" is not a compound of two German words, and has no meaning. "Guil" is not German. It is met with frequently in French, Spanish and Italian names, and is in these languages pronounced "e" or "we". In English words where the syllable ends in a consonant, it is uniformly pronounced "i", as in guild, guilt, guinea. In English proper names it is given the same sound. Examples are "Guilford," "Guilford Court House," the London "Guildhall," "Guilden-stern," "Guinevere," "Guiteau." We fail to find a single English proper name where "Gui" is pronounced like "guy." It may be true, as counsel for plaintiff says, that the name of Honorable Curtiss Guild, is pronounced with the sound of long i, and that an Illinois family of the same name pronounce it in the same way. It is also true that people who have no acquaintance with foreign names, pronounce them in many different ways. But on the whole we are inclined to agree with the conclusion of the trial court that "Geilfuss" and "Guilfuss" are not idem sonans.

This conclusion does not however necessarily result in a concurrence in the decision of the trial court that the difference in the names constituted a fatal defect. Where the summons is served by publication the true test should not be whether the names are strictly idem sonans—sound the same to the ear when pronounced—but whether they look substantially the same in print. This is the effect of Lane v. Innis, 43 Minn. 143, and in D'Autremont vs. Anderson Iron Co., 104 Minn. 165, the principle is recognized. It is not easy to see why the similarity in the sound of the names sh uld be the controlling factor when the names are not sounded, but read. In many cases of common names that are strictly idem sonans, it could not well be said that the difference in the appearance to the eye in the published summons would be immaterial. If John Olson was sued as John Olsen, James Reid as James Reade, George Taylor as George Tailor, the names would be strictly idem sonans, and yet it should not be held that the defendant or his acquaintances could not mistake as to who was intended. So if the names are not
146 strictly idem sonans, but look so much alike in print that it can be said that defendant or his acquaintances who saw

the published notice could not mistake the person intended, the variation ought not to be held fatal. While the great majority of the cases proceed on the rule of idem sonans, we are unable to see on principle why this doctrine is applicable at all when the question arises on the difference in spelling of the true name of defendant and the name as given in the published summons. If the variation is such that the eye does not recognize the names as the same, it is fatal, but if to the eye the name taken as a whole, looks not materially different from the true name, so that the defendant and his acquaintances would unhesitatingly say that defendant was the person named in the printed summons, then it seems unreasonable to say that the mistake in spelling is fatal. While substituted service by publication is purely statutory and in derogation of the common law, while strict compliance with the statutory provisions is necessary to constitute due process of law, this does not mean that errors in the spelling of proper names are always fatal defects. The inquiry should always be; was it possible that because of the error defendant failed to receive a notice that would otherwise have reached him? It is true that service by publication is not a certain method of giving defendant notice even where his name is accurately given. But does the error in the name make it less certain? That must depend on the particular facts in each case. It is not of much assistance to compare the almost numberless authorities. See note to Thornily v. Prentice, 100 Am. St. Rep. 322, with alphabetical lists of names held to be idem sonans and and held to be not idem sonans. When decisions are so numerous, and so variant, it serves to confuse, rather than help. But we find the essence of the rule we have attempted to formulate in many of the cases. On principle and under Lane v. Innes, supra, it can hardly be doubted that it is the true rule.

In deciding whether the difference between the names in this case was such as might be misleading to persons reading the printed summons, we will assume that the name of the judgment creditor of John McKinley was Albert B. Geilfuss, assignee, as it ap-
147 peared in the judgment book and judgment roll. The question then is, placing the names "Albert Guilfuss, assignee," and "Albert B. Geilfuss, assignee" in juxtaposition, was there so material a change as to be misleading? Could defendant or anyone knowing him, on reading the published summons, mistake the person intended? Lane v. Innes, supra. We must compare the names as a whole, including the given name, both syllables of the surname and the designation attached. The given name is the same, the last syllable of the surname is the same, the designation or description "Assignee" is the same. The name as a whole is decidedly unusual. Indeed it would be a remarkable coincidence if there were two persons in the world, one known as "Albert B. Geilfuss, assignee," and the other as "Albert Guilfuss, assignee." The only differences are the absence of the middle initial "B," and the use of the vowels ui in place of ei. We have reached the conclusion, considering each name as a whole, that the differences between them are trivial, and

not such as could possibly cause defendant or anyone knowing him to doubt that he was the person intended to be named.

This leads to the conclusion that the judgment lien of Albert B. Geilfuss, assignee, on the McKinley interest was cut out by the sale in the partition suit and that defendant Grannis is not the owner of that interest unless we can sustain the point that the court was without jurisdiction to decree a sale in that suit. This contention of defendant will be considered on the appeal of defendants Grannis and Dickerman.

2. The appeal of defendants Grannis and Dickerman involves their right to a lien on the Elder interest in the lands by virtue of the sale of that interest on execution under a judgment against Elder entered after the partition sale. If the court in the partition action had jurisdiction to decree a sale, admittedly Elder's interest was cut off by that sale and defendants have no lien. They contend, however, that the court in the partition suit was wholly without jurisdiction to decree a sale of the lands or to confirm such sale and that its judgment in that respect is void and can be attacked collaterally.

148 This contention is founded upon the statutes of this state in force at the time of the partition action. G. S. 1894, Sec. 5781 provides: "If it is alleged in the complaint and established by evidence that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court, except as provided in the next section, may order a sale thereof" etc. The next section provides that when there are liens on the property amounting to more than the value thereof as stated in the complaint or when it appears probable that the property will not sell for a sum equal to the amount of the liens, "no sale shall be made."

Section 5787 provides for proof of the amount of any liens on the property of which partition is sought, and that if said liens do not amount to the value of the premises as admitted or proved, a sale may be ordered. Payment of the liens is to be made out of the proceeds of the sale before division of the residue among the owners of the property.

The McKinley interest in the property was subject to judgment liens in excess of $50,000, the Elder interest to judgment liens in excess of $350,000; the interest of the Mesaba Land Company was subject to a mortgage for over $11,000. In the partition suit it was alleged in the complaint and adjudged that the lands involved were of the value of $1,200. They were sold at the partition sale for $6,700. It appears therefore that there were liens on three of the five undivided interests far in excess of the value of the entire property as alleged in the complaint. The claim is that by reason of the existence of these liens and the provisions of Section 5782 that "no sale shall be made" when the liens amount to more than the value of the property, the court had no jurisdiction to order a sale, and that its judgment was absolutely void and subject to attack collaterally.

We are clear that this claim cannot be sustained. It may have been error to decree a sale under the facts alleged and proved, but

the court had jurisdiction of the subject matter and of the parties, and the error in ordering a sale was at the most an error
149 that might have been taken advantage of on appeal. The court had jurisdiction to order a sale in a proper case. If the pleadings or proof showed that it was improper to do so, it was error, but the order was not in excess of the court's jurisdiction, and not void. There is no doubt that though a court have jurisdiction of the subject matter and the parties, if it exceeds its jurisdiction, makes a judgment of order which in no case it had jurisdiction to make, such judgment or order is void. But where the judgment attacked is one which the court could rightfully enter, if the pleadings and proof warranted it, it cannot be said to be an excess of jurisdiction if it be shown that under the pleadings or proof the judgment ought not to have been rendered. There is nothing in Sache v. Wallace, 101 Minn. 169, that is in the least inconsistent with this statement. The law is so well settled that we consider further discussion or the citation of authorities unnecessary. Whether the statute applies to a case like this, where the undivided interest in the land of one of the owners thereof is free from all liens, we do not decide, but even assuming that it does, we hold that the court in the partition action did not exceed its jurisdiction in adjudging a sale of the property or in confirming that sale. It follows that Elder's undivided interest passed by the partition sale, and that he owned no interest at the time the judgment owned by defendants was rendered. They therefore acquired no lien by the attempted levy and sale of that interest on execution.

The judgment is reversed on plaintiff's appeal, with directions to the trial court to amend its conclusions of law and grant judgment for plaintiffs in accordance with this opinion.

Affirmed on appeal of defendants Grannis and Dickerman.

BUNN, *J.*

150 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased, Frank Woodman and the Oliver Iron Mining Company, Appellants and Respondents,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants; HENRY J. GRANNIS, Respondent.

(Endorsed:) Filed June 15, 1912. I. A. Casewell, Clerk.

Petition for Rehearing.

To the Honorable Supreme Court of the State of Minnesota:

The undersigned, Henry J. Grannis, one of the defendants and the Respondent upon the appeal of the plaintiffs, in the above en-

titled cause, files this his petition for a rehearing of the matters and issues involved in the plaintiffs' appeal herein and specifies the following grounds and reasons for such rehearing.

1. The record of the District Court of St. Louis County, certified to this court upon said appeal, shows that this Respondent, prior to the commencement of this action, succeeded to the title of John McKinley, the owner of an undivided one-fifth of the lands involved in this action, by virtue of the sale of said one-fifth interest, upon execution issued upon a judgment in favor of Albert B. Geilfuss, Assignee, a non-resident, against said John McKinley, for the sum of $2,854.02, docketed January 5, 1894, and mesne conveyances from the purchaser at said execution sale and the judgment of said District Court, from which the plaintiffs appeal, adjudged that this Respondent was the owner of said undivided one-fifth interest in said lands. Upon the plaintiffs' appeal, the said title of Respond-
151 ent is drawn in question, upon the claim that the lien of the aforesaid judgment was divested, prior to said execution sale, by reason of proceedings taken in a certain partition action, mentioned in the record, commenced on the 8th day of November, 1895, by one George A. Elder, as plaintiff, and against Mesaba Land Company, John McKinley and others, as defendants and the service of the summons, in said partition action by publication thereof, wherein Albert Guilfuss, assignee, was named as a defendant, but without any other or further service or appearance. In the opinion of this court, filed herein on the 7th of June, 1912, the said contention of the plaintiffs is sustained and it is held that jurisdiction was obtained of Albert B. Geilfuss, Assignee, in the partition action, by virtue of the aforesaid service by publication and the Respondent's title defeated in consequence thereof and judgment is directed to be entered accordingly. This Respondent respectfully submits and claims that, if the said decision of this court is permitted to stand, he will be deprived of said property, without due process of law and contrary to the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States and Respondent claims the protection of said provision of the Constitution of the United States.

2. That while the necessary effect of the said decision of this court, as claimed by this Respondent, is to deprive him of his said property, without due process of law, contrary to the provisions of Article XIV of the Amendments to the Constitution of the United States, that question was not specifically considered or passed upon, as indicated by the opinion and decision filed on said 7th of June, 1912.

3. That in order to satisfy the due process of law provisions of the XIV Amendment to the Constitution of the United States, where it is sought to obtain jurisdiction of a non-resident, by publication of the summons, such non-resident must be proceeded against by his true name and such name, or a name which, under the circumstances of the case, is the same as his true name, within the rule of idem sonans, must be inserted in the summons
152 and appear in the summons as published, otherwise no valid service is had upon or jurisdiction obtained over such non-

resident. The Respondent respectfully submits and claims that this court in said decision, has failed to observe the requirements as to due process of law and, if said decision is permitted to stand, the Respondent will be thereby deprived of his said property, without due process of law and contrary to said constitutional provision.

4. Further, that the test and rule applied by this court to determine whether the court, in the partition case, obtained jurisdiction of Albert B. Geilfuss, Assignee, the owner of said judgment, and a non-resident, by the aforesaid service by publication, wherein Albert Guilfuss, Assignee, was named as a defendant, to-wit, that to the eye and as printed the published name and the true name are substantially the same, though the second vowel of the surnames *are* different and the middle initial is omitted from the published name, were not warranted by the settled and ordinary rules and modes of procedure applicable in such cases, or required to satisfy the provisions of the XIV Amendment to the Constitution of the United States. It is also submitted that the rule of decision, applied in this case, will be of such far reaching effect, as a precedent in determining titles to real property, that the same should not be adopted unless the court is satisfied that this particular question has received its deliberate consideration; and in this connection it may be suggested that there were many questions argued, both in the briefs of counsel and orally, in this case and the case of Whiteside et al. vs. Grannis et al., argued at the same time, and the Respondent, at least, is conscious of a lack of such full argument and presentation of the particular question referred to in this paragraph, as he would have felt called upon to make, if he had apprehended that the determination of this branch of the case was likely to be made upon the grounds above referred to and stated in the opinion.

153 5. Even conceding that jurisdiction was obtained over Albert B. Geilfuss, Assignee, the owner of said judgment, in the partition action, by proper service of the summons upon him, there is no showing in the findings or elsewhere, that this judgment was paid and discharged, through the partition proceedings or otherwise, but on the contrary it appears, from the findings, that the judgment was enforced, after the commencement of the partition action, by sale of the lands involved in this action and certain other lands (Paper Book folios 141-154). The Respondent claims that the mere making of the owner of the judgment lien a party to the partition action and serving him with the summons therein, did not bar the lien of his judgment upon the property involved in that action, unless other and further proceedings were taken in conformity with the statutes governing the partition action which would result either in the payment of the judgment or cutting off the lien thereof. Payment of the judgment was not made and the lien thereof could be barred only by proceedings in conformity with Sections 5805 and 5806, General Statutes, 1894, assuming that the owner of the judgment was properly served. Section 5805 provides that "The conveyance shall be recorded in the county where the premises are situated and shall be a bar against all persons interested in the property in any way, who have been named as parties in the action and against all such parties and persons as were un-

known, if the summons has been properly served and against all persons claiming from them or either of them." The conveyance referred to is that mentioned in Section 5803, being the conveyance which the Referee appointed to make a sale shall execute to the purchaser. Section 5806 provides for the bar of liens upon the property or interests therein by reason of the aforesaid conveyance. In this connection, the point to which we desire to call particular attention is, that, in order to operate as a bar against liens not paid or existing interests, the conveyance of the Referee making the sale, in the partition action, must be recorded in the county where the premises are situated. In the case at bar, the return to this court does not show the record of the Referee's deed. The findings show that such a deed was executed and delivered, but do not show that
154 the same was recorded (Paper Book folio 138). Partition by sale being a purely statutory proceeding, it follows that compliance with the statutes under which the sale is made must appear. This point was inadvertently overlooked by counsel for Respondent and was not presented to this court and was apparently not considered by the court in making its decision. If the lien of the Geilfuss judgment was not cut off, it necessarily follows that the Respondent's title derived from a sale upon execution issued on said judgment is valid.

Dated June 14, 1912.

HENRY J. GRANNIS,
Attorney pro se.

HENRY F. GREENE,
Counsel for Respondent.

155 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

17552.

ALBERT L. ORDEAN et al., Appellants and Respondents,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants;
HENRY J. GRANNIS, Respondent.

Amended Petition for Rehearing.

Henry J. Grannis, Attorney pro se; Henry F. Greene, of Counsel.

Filed Jun- 26, 1912. I. A. Caswell, Clerk.

156 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased, Frank Woodman and the Oliver Iron Mining Company, Appellants and Respondents,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants;
HENRY J. GRANNIS, Respondent.

Amended Petition for Rehearing.

To the Honorable Supreme Court of the State of Minnesota:

The undersigned, Henry J. Grannis, one of the defendants and the Respondent upon the appeal of the plaintiffs, in the above entitled cause, files this his petition for a rehearing of the matters and issues involved in the plaintiffs appeal herein and specifies the following grounds and reasons for such rehearing.

1. The record of the District Court of St. Louis County, certified to this court upon said appeal, shows that this Respondent, prior to the commencement of this action, succeeded to the title of John McKinley, the owner of an undivided one-fifth of the lands involved in this action, by virtue of the sale of said one-fifth interest, upon execution issued upon a judgment in favor of Albert B. Geilfuss, Assignee, a non-resident, against said John McKinley, for the sum of $2,854.02, docketed January 5, 1894, and mesne conveyances from the purchaser at said execution sale and the judgment of said District Court, from which the plaintiffs appeal, adjudged that this Respondent was the owner of said undivided one-fifth interest in said lands. Upon the plaintiffs' appeal, the said title of Re-
157 spondent is drawn in question, upon the claim that the lien of the aforesaid judgment was divested, prior to said execu-

tion sale, by reason of proceedings taken in a certain partition action, mentioned in the record, commenced on the 8th day of November, 1895, by one George A. Elder, as plaintiff, and against Mesaba Land Company, John McKinley and others, as defendants and the service of the summons, in said partition action by publication thereof, wherein Albert Guilfuss, Assignee, was named as a defendant, but without any other or further service or appearance. In the opinion of this court, filed herein on the 7th of June, 1912, the said contention of the plaintiffs is sustained and it is held that jurisdiction was obtained of Albert B. Geilfuss, Assignee, in the partition action, by virtue of the aforesaid service by publication and the Respondent's title defeated in consequence thereof and judgment is directed to be entered accordingly. This Respondent respectfully submits and claims that, if the said decision of this court is permitted to stand, he will be deprived of said property, without due process of law and contrary to the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States and Respondent claims the protection of said provision of the Constitution of the United States.

2. That while the necessary effect of the said decision of this court, as claimed by this Respondent, is to deprive him of his said property, without due process of law, contrary to the provisions of Article XIV of the Amendments to the Constitution of the United States, that question was not specifically considered or passed upon, as indicated by the opinion and decision filed on said 7th of June, 1912.

3. That in order to satisfy the due process of law provisions of the XIV Amendment to the Constitution of the United States, where it is sought to obtain jurisdiction of a non-resident, by publication of the summons, such non-resident must be proceeded against by his true name and such name, or a name which, under the circumstances of the case, is the same as his true name, within the rule of idem sonans, must be inserted in the summons and appear
158 in the summons as published, otherwise no valid service is had upon or jurisdiction obtained over such non-resident. The Respondent respectfully submits and claims that this court in said decision, has failed to observe the requirements as to due process of law and, if said decision is permitted to stand, the Respondent will be thereby deprived of his said property, without due process of law and contrary to said constitutional provision.

4. Further, that the test and rule applied by this court to determine whether the court, in the partition case, obtained jurisdiction of Albert B. Geilfuss, Assignee, the owner of said judgment, and a non-resident, by the aforesaid service by publication, wherein Albert Guilfuss, Assignee, was named as a defendant, to-wit, that to the eye and as printed the published name and the true name are substantially the same, though the second vowel of the surnames *are* different and the middle initial is omitted from the published name, were not warranted by the settled and ordinary rules and modes of procedure applicable in such cases, or required to satisfy the provisions of the XIV Amendment to the Constitution of the United States. It is also submitted that the rule of decision, applied

in this case, will be of such far reaching effect, as a precedent in determining titles to real property, that the same should not be adopted unless the court is satisfied that this particular question has received its deliberate consideration; and in this connection it may be suggested that there were many questions argued, both in the briefs of counsel and orally, in this case and in the case of Whiteside et al. vs. Grannis, et al., argued at the same time, and the Respondent, at least, is conscious of a lack of such full argument and presentation of the particular question referred to in this paragraph, as he would have felt called upon to make, if he had apprehended that the determination of this branch of the case was likely to be made upon the grounds above referred to and stated in the opinion.

159 5. The petitioner respectfully submits that the decision of the court, with respect to the identity of the name of the owner of the judgment, Albert B. Geilfuss, Assignee, and the name contained in the published summons, Albert Guilfuss, Assignee, is contrary to the great weight of authority in this state and other states, is not sound in principle and affords no certain guide for the determination of like questions in the future. The petitioner understands that the court does not desire, at this time, to have a brief presented, and the petitioner does not purpose to enter upon any argument, except in so far as may be necessary to make his meaning clear. The gist of the opinion on this particular question may be stated by the following quotations therefrom. "Where the summons is served by publication, the true test should not be whether the names are strictly idem sonans—sound the same to the ear when pronounced—but whether they look substantially the same in print." At another point in the opinion, this language was used: "While the great majority of the cases proceed on the rule of idem sonans, we are unable to see on principle why this doctrine is applicable at all when the question arises on the difference in spelling of the true name of defendant and the name as given in the published summons. If the variation is such that the eye does not recognize the names as the same, it is fatal, but if to the eye the name, taken as a whole, looks not materially different from the true name, so that the defendant and his acquaintances would unhesitatingly say that defendant was the person named in the printed summons, then it seems unreasonable to say that the mistake in spelling is fatal."

As it was stated by this court, in substance, in Clary vs. O'Shea, 72 Minn. 105, the name of the defendant to be served, as contained in the published summons, is selected from all other persons in the world by that name alone. Applying that rule to the case at bar, the name of the person to be served, selected by the plaintiff in the partition action, was Albert Guilfuss, Assignee, and as held in Skelton vs. Sackett, 91 Mo. 377, notice by publication is a proceeding against the name and to be effectual, the name must be correctly set forth. In Miller vs. Keaton, 236 Mo. 694, it was held

160 that substituted service cannot be had upon one by some other name than his true name. In Yarbough vs. Pugh, 63 Washington, 140, 33 L. R. A. (N. S.), 351, the court said: "A con-

structive service depends almost entirely upon the correctness of the name in the process, of the person to be served, for its coming to the notice of such person."

Added emphasis is given to the above decisions, in the case at bar, by the provisions of Section 5771, General Statutes, 1894, relating to partition actions (and not referred to in the arguments and briefs of counsel or by the court) requiring that the summons in partition actions shall be "addressed by name to all owners and lien holders who are known," etc. This differs from Section 5194, governing the summons in general civil actions, in specifically requiring the summons to be addressed by name to a certain class of defendants, to which class the judgment creditor Geilfuss belonged.

Identity of person is presumed from identity of name, but as held in Morris vs. McClary, 43 Minn. 346, very slight evidence is required to overcome this presumption. The general rule, as we understand it, is that in order to be identical, the two names must be spelled, in all respects, alike and some courts have suggested that, in cases of service by publication upon non-resident defendants, no exceptions to this rule should be recognized (See note 30 L. R. A. (N. S.) 122). But practically all courts have recognized that this general rule is subject to the exception known as the doctrine of idem sonans and this exception, in cases of jurisdiction of non-residents by publication, is justified solely upon the ground that the names are the same, because they sound alike. We venture to say that the doctrine that jurisdiction of a non-resident can be obtained by a publication in which he is described by a name differing in spelling from his true name and not idem sonans therewith, has not been given any such extended formal statement and argument by any other court of last resort. The decision in Lane vs. Innes, was commented upon by the Respondent in his brief herein, page 29, and it was there pointed out that that case followed the decision of the trial court, which applied the doctrine of idem sonans.

161 Because of the novel character of the grounds upon which the decision in this case is based, and of the importance of having certain and definite rules in determining questions of jurisdiction, and for the other reasons herein set forth, it has seemed to the petitioner that the court might be willing and desirous to have a rehearing.

It may also be suggested that the rule of idem sonans is an exception to the general rule, requiring accuracy in the spelling of the name of a defendant, in cases of service by publication and is applied only in cases where the variation is slight. The fact that the rule of idem sonans should not, under all circumstances, be applied, even where the names sound alike, we submit does not justify the adoption of another exception to the general rule requiring accuracy of spelling of names and in such cases we believe the authorities sustain the application of the general rule. See Hubner vs. Reickhoff, 103 Ia. 368, and cases cited in note 30 L. R. A. (N. S.), 122. See also memorandum of the trial court, Paper Book, Page 118.

The above suggestion is made in connection with the part of the opinion in the case at bar, which refers to the failure of the rule of

idem sonans in certain cases, such as Reid and Reade, Taylor and Tailor, but we submit that because the rule of idem sonans, the exception to the general rule, cannot be applied in such cases, is no argument why the general rule should not prevail.

We also suggest that the rule of idem sonans has been repeatedly recognized in this state, as an exception to the general rule, in determining questions of identity and has become, in a certain sense, a rule of property and, when applied, there has been nothing in the prior decisions of this court to indicate that any other exception to the general rule is warranted or that this court intended to take a position different from that of other states. See Stein vs. Hanson, 90 Minn. 387-391; Atwood vs. Landis, 22 Minn. 558; Massillon, etc., Co. vs. Holdridge, 68 Minn. 393; MacComber vs. Kinney, 114 Minn. 146-159.

The general rule, requiring absolute accuracy in the spelling of the name of a non-resident defendant, in a published notice, is definite and certain and easily applied — the exception to the rule,
162 based upon the doctrine of idem sonans, as defined and limited by the courts, is reasonably definite and certain. But, we submit, that the application of the doctrine that the rights of a non-resident, concededly not accurately named in the notice, may be determined by similarity of appearance of the published name and the true name, affords no reasonably certain and definite test by which such non-resident or others may know who is intended. The question whether the variation is much or little, whether the published name resembles the true name sufficiently to say that the party bearing the true name was intended to be reached, necessarily rests upon the individual point of view of the person or judge called upon to pass upon that question and, in the final analysis, each individual case must be submitted to the court of last resort. That questions of jurisdiction, should be based upon rules generally applicable and capable of reasonably definite statement is, of course, desirable and the history of jurisprudence shows that efforts to establish such rules have been persistent.

6. Even conceding that jurisdiction was obtained over Albert B. Geilfuss, Assignee, the owner of said judgment, in the partition action, by proper service of the summons upon him, there is no showing in the findings or elsewhere, that this judgment was paid and discharged, through the partition proceedings or otherwise, but on the contrary, it appears, from the findings, that the judgment was enforced, after the commencement of the partition action, by sale of the lands involved in this action and certain other lands (Paper Book, folios 141-154). The Respondent claims that the mere making of the owner of the judgment lien a party to the partition action and serving him with the summons therein, did not bar the lien of his judgment upon the property involved in that action, unless other and further proceedings were taken in conformity with the statutes governing the partition action which would result either in the payment of the judgment or cutting off the lien thereof. Payment of the judgment was not made and the lien thereof could be

barred only by proceedings in conformity with Sections 5805 and 5806, General Statutes, 1894, assuming that the owner of the judgment was properly served, and that the lien of such judgment
163 may be constitutionally cut off by virtue of proceedings conformable to said sections. Section 5805 provides that "The conveyance shall be recorded in the county where the premises are situated and shall be a bar against all persons interested in the property in any way, who have been named as parties in the action and against all such parties and persons as were unknown, if the summons has been properly served and against all persons claiming from them or either of them." The conveyance referred to is that mentioned in Section 5803, being the conveyance which the Referee appointed to make a sale shall execute to the purchaser. Section 5806 provides for the bar of liens upon the property or interests therein mentioned by reason of the aforesaid conveyance. In this connection, the point to which we desire to call particular attention is, that, in order to operate as a bar against liens not paid or existing interests, the conveyance of the Referee making the sale, in the partition action, must be recorded in the county where the premises are situated. In the case at bar, the return to this court does not show the record of the Referee's deed. The findings show that such a deed was executed and delivered, but do not show that the same was recorded (Paper Book, folio 138). Partition by sale being a purely statutory proceeding, it follows that compliance with the statutes under which the sale is made must appear. This point was inadvertently overlooked by counsel for Respondent and was not presented to this court and was apparently not considered by the court in making its decision. If the lien of the Geilfuss judgment was not cut off, it necessarily follows that the Respondent's title derived from a sale upon execution issued on said judgment is valid.

7. The lien of the Geilfuss judgment was a vested property right and could only be cut off by a proceeding which would in fact result in the payment thereof, or which was reasonably calculated to reach that result. The judgment in the partition action shows that there were judgments against John McKinley, amounting, exclusive of interests, to more than $350,000.00 and that the entire property of which McKinley owned one-fifth, was worth $1,200.00. There were judgments docketed prior to the judgment of January 5,
164 1894, under which Respondent claims, amounting to $3,587.17, exclusive of interest, so that there was manifestly no reasonable probability of the partition proceedings, by sale of the property, resulting in the payment of the judgment and satisfaction of the lien and the same was not in fact paid. We submit that the provisions of Chapter 74, General Statutes 1894, and particularly Sections 5782 and 5787, contemplate that if a sale is ordered, the liens shall be satisfied out of the proceeds of the sale, and we maintain that Sections 5805 and 5806 of said Chapter 74, must be construed in connection with the other Sections herein referred to and that said Sections 5805 and 5806, in so far as they purport to bar liens against property sold in partition proceedings, where the liens are not paid, or where, under the circumstances of the

case, the proceedings taken cannot reasonably be expected to result in payment, are void on the ground that the same deprive the lien holder or holders of their property without compensation, contrary to the provisions of Article XIV of the Amendments to the Constitution of the United States. We further contend that the mere fact of the service of summons upon a lien holder and the obtaining of jurisdiction over him in the partition action, does not give the court the right to deprive such lien holder of his property in said lien, without payment or the pursuit of a proceeding reasonably calculated to effect payment and that a construction of the statute which brings about this result d-rives the lien holder of his property without due process of law, contrary to said XIV Amendment. The Respondent contends that, for the reasons hereinabove indicated, even if there was valid service upon Albert B. Geilfuss, Assignee, the owner of said judgment, the lien of said judgment could not be legally and constitutionally cut off by the proceedings had and that said Sections 5805 and 5806, in so far as the same contemplate such a result are invalid and void, and result in depriving the Respondent of his property without due process of law, contrary to said constitutional provision.

8. That the ownership and lien of said Geilfuss judgment was a personal right and constituted property personal to the owner
165 thereof and said owner being a non-resident of this State and beyond the jurisdiction of the ordinary processes of the courts of this state, his rights in and to the ownership and lien of said judgment could not be barred by serving him with a summons in said partition action, by publication, that in so far as the provisions of said Chapter 74, General Statutes 1894, attempted so to do and in so far as a construction of said Statutes maintain that such results can be accomplished, said statutes are contrary to the provisions of Article XIV of the Amendments to the Constitution of the United States and the same and such construction thereof result in depriving the Respondent, claiming under the said Geilluss judgment, of his property without compensation and without due process of law, contrary to the provisions of said XIV Amendment.

Dated June 25th, 1912.

Respectfully submitted,

HENRY J. GRANNIS,
Attorney pro se.

HENRY F. GREENE,
Of Counsel for Respondent.

166 17552. State of Minnesota, Supreme Court. Albert L. Ordean et al., Appellants-Respondents, vs. Henry J. Grannis et al., Respondents-Appellants. Opinion. Filed July 5, 1912. I. A. Caswell, Clerk. Per Curiam.

167 17552.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

No. 120.

ALBERT L. ORDEAN et al., Appellants-Respondents,
vs.
HENRY J. GRANNIS et al., Respondents-Appellants.

Per Curiam:

In a petition for reargument filed by defendant Grannis, it is suggested that the necessary effect of the decision of this court is to deprive him of his property without due process of law, contrary to the provisions of Article XIV of the Amendments to the Constitution of the United States, though the question was not specifically decided. We necessarily hold against this contention of defendant, and so interpret the decision.

The petition for reargument is denied.

168 17552. State of Minnesota, Supreme Court. Copy of Minutes of Argument. Filed July 11, 1912. I. A. Caswell, Clerk.

169 STATE OF MINNESOTA:

Supreme Court.

General April Term, A. D. 1912.

THURSDAY MORNING, 9:30 O'CLOCK, *May* 23, *A. D.* 1912.

Court convened pursuant to adjournment. All the Justices being present.

Reg. No. 17552. Cal. No. 120.

ALBERT L. ORDEAN et al., Respondents,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants,

and

ALBERT L. ORDEAN et al., Appellants,
vs.
HENRY J. GRANNIS et al., Defendants,
HENRY J. GRANNIS, Respondent.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

I. A. CASWELL, *Clerk.*

By —— ——, *Deputy.*

170 No. 17752. State of Minnesota, Supreme Court. Copy of Order for Judgment. Filed July 11, A. D. 1912. I. A. Caswell, Clerk.

171 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

No. 120.

ALBERT L. ORDEAN et al., Respondents,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants,

and

ALBERT L. ORDEAN et al., Appellants,

vs.

HENRY J. GRANNIS et al., Defendants; HENRY J. GRANNIS, Respondent.

Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the General April Term of this court A. D. 1912 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things reversed on plaintiffs' appeal, with directions to the trial court to amend its conclusions of law and grant judgment for plaintiffs in accordance with the opinion of this Court; and affirmed on the appeal of defendants and that judgment be entered accordingly.

Entered July 11, A. D. 1912.

BY THE COURT.

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

I. A. CASWELL, *Clerk.*

172 17752. State of Minnesota. Supreme Court. Transcript of Judgment. Filed July 11, A. D. 1912. I. A. Caswell, Clerk.

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, July 11, A. D. 1912.

[SEAL.] I. A. CASWELL, *Clerk.*

173 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

No. 120.

ALBERT L. ORDEAN et al., Respondents,
vs.
HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants.

and

ALBERT L. ORDEAN et al., Appellants,
vs.
HENRY J. GRANNIS et al., Defendants; HENRY J. GRANNIS, Respondent.

Pursuant to an order of Court duly made and entered in this cause July 11, A. D. 1912,

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court of the Eleventh Judicial District, sitting within and for the County of St. Louis, be and the same hereby is in all things reversed on plaintiffs' appeal, with directions to the trial court to amend its conclusions of law and grant judgment for plaintiffs in accordance with the opinion of this Court; and affirmed on the appeal of defendants. And it is further determined and adjudged that the Plain-

iffs above named do have and recover of said Henry J. Grannis, Defendant herein, the sum and amount of One Hundred Five nd 50/100 Dollars ($105.50) costs and disbursements in this cause n this Court, and that execution may be issued for the enforcement hereof.

Dated and signed July 11, A. D. 1912.

BY THE COURT.

Attest:
I. A. CASWELL, *Clerk.*

Statement for Judgment.

Cost allowed by statute	$25.00
Printer's fees	60.75
Clerk's fees, Supreme Court	14.50
Affidavits and Acknowledgments	.75
Return	3.75
Postage and express	.75
Filing Mandate	.....
	$105.50

174 17552. State of Minnesota. Supreme Court. A. L. Ordean, et al., Respondents-Appellants, vs. H. J. Grannis, et al., Appellants-Respondents. Judgment Roll. Filed July 11, 1912. I. A. Caswell, Clerk.

175 *Authentication of Record.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, Clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Albert L. Ordean, et al., Appellants and Respondents, vs. Henry J. Grannis, et al., Appellants, and Henry J. Grannis, Respondent, Return to State Supreme Court, assignments of error of plaintiffs on their appeal, Opinion of Supreme Court, Petition for Rehearing, Amended Petition for Rehearing, Opinion of the Court denying said Petition, and Judgment Roll, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 29th day of July, 1912.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court, Minnesota.

176 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman, and the Oliver Iron Mining Company, Appellants and Respondents,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants; HENRY J. GRANNIS, Respondent.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota.

Now comes the said Henry J. Grannis, one of the defendants and the Respondent, named in the above entitled cause, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota, in the above entitled cause, there is manifest error in this to-wit:

1. The Supreme Court of the State of Minnesota, erred in reversing the judgment of the District Court of St. Louis County, Minnesota, wherein and whereby it was adjudged and decreed that the said Henry J. Grannis, is the owner in fee simple of an undivided one-fifth (und. 1/5) of the lands, title to which is involved in this action.

2. Said Supreme Court erred in holding and deciding that in a certain partition action, commenced in the District Court of St. Louis County, Minnesota, on the 8th day of November, 1895, wherein one George A. Elder, was plaintiff and Mesaba Land Company, John McKinley and others, were defendants, and which

177 involved the lands herein involved and certain other lands, jurisdiction was obtained of Albert B. Geilfuss, Assignee, a non-resident of the State of Minnesota, the owner of a judgment against said John McKinley, for the sum of two thousand eight hundred fifty-four and 02/100 ($2,854.02) Dollars, docketed in said District Court of St. Louis County, January 5, 1894, by the service of the summons in said partition action, by publication thereof, and not otherwise, in which summons as published and in all the files, records and proceedings in said partition action, appeared the name Albert Guilfuss, Assignee, among the names of the defendants, but in which summons the name Albert B. Geilfuss, Assignee, did not appear nor did said name appear in any of the other files, records or proceedings in said partition action. The plaintiffs in the case hereinabove entitled, and herein named as Appellants and Respondents, claim title to the lands involved in this action, through mesne conveyances from the purchaser of sand lands, at a sale thereof had pursuant to the judgment of said District Court in said partition action and the said Henry J. Grannis, Respondent as aforesaid,

claims title and the said District Court adjudged that he had title, to an undivided one-fifth (und. 1/5) of said lands, by virtue of mesne conveyances, from the purchaser of said one-fifth interest at an execution sale, upon an execution issued upon said judgment in favor of Albert B. Geilfuss, Assignee, and against said John McKinley, the said John McKinley being at the time of the docketing of said judgment, as aforesaid, the owner of an undivided one-fifth (und. 1/5) interest in said lands.

3. Said Supreme Court erred in its said decision and judgment, reversing said judgment of said District Court of St. Louis County and holding that the aforesaid service of summons, by publication, was binding upon said Albert B. Geilfuss, Assignee, in that said decision and judgment deprives the said Respondent, Henry J. Grannis, of his said property, to-wit, an undivided one-fifth (und. 1/5) of the lands herein involved, without due process of law and contrary to the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States.

178 4. Said Supreme Court erred, in denying the claim of said Respondent, Henry J. Grannis, that the aforesaid service of summons by publication, in said partition action, in which summons the name Albert B. Geilfuss, Assignee, the then owner of said judgment against said John McKinley, did not appear among the names of the defendants, but in which the name Albert Guilfuss, Assignee, appeared as one of the defendants, and there was no personal service upon either Albert B. Geilfuss, Assignee, or Albert Guilfuss, Assignee, and no appearance by them, or either of them, was not in compliance with, but on the contrary was in contravention of the due process of law provisions of the XIV Amendment to the Constitution of the United States and that the decision and judgment of said Supreme Court, denying the said claim of said Respondent, deprives him of his said property, without due process of law and contrary to the provisions of said XIV Amendment.

5. Said Supreme Court erred in holding, in effect, as applied to this case and the aforesaid service of summons, that where the summons is served by publication, the true test should not be whether the name in the published summons and the true name are strictly idem sonans—sound the same to the ear when pronounced, but whether they look substantially the same in print and that this test and the application thereof to the facts of this case, result in depriving said Respondent, Henry J. Grannis, of his said property, without due process of law and contrary to the said provisions of said XIV Amendment to the Constitution of the United States.

6. Said Supreme Court erred in denying the claim of said Respondent, Henry J. Grannis, that under the due process of law requirements of the XIV Amendment to the Constitution of the United States, jurisdiction could not be obtained of said Albert B. Geilfuss, Assignee, a non-resident, by publication of summons, unless his true name or a name which is the same as his true name, within the rule of idem sonans was inserted in the summons and other proceedings.

7. The said Supreme Court erred in holding and deciding, that the

aforesaid judgment lien of Albert B. Geilfuss, Assignee, on
179 the McKinley interest in said land, was cut out by the sale in the partition suit and that the said defendant, Grannis, is not the owner of that interest and such holding and decision deprives said Respondent, Grannis, of his said property without due process of law and contrary to said XIV Amendment.

8. Said Supreme Court erred in denying the claim of the said Respondent, Henry J. Grannis, that the ownership and lien of said judgment in favor of Albert B. Geilfuss, Assignee, was a personal right and constituted personal property and that said Albert B. Geilfuss, Assignee, being a non-resident of the State of Minnesota and beyond the jurisdiction of the ordinary processes of the courts of said State, his rights in and to the ownership and lien of said judgment could not be barred by serving him by publication with a summons in said partition action, even if a proper service by publication was made, and that in so far as the provisions of Chapter 74, General Statutes of the State of Minnesota, 1894, attempted so to do, and in so far as a construction of said statutes maintain- that such results can be accomplished, said statutes and such construction are in conflict with with the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States, and the same and such construction thereof result in depriving said Respondent, Henry J. Grannis, claiming under said Geilfuss judgment, of his said property, without compensation and without due process of law, contrary to the provisions of said XIV Amendment.

9. Said Supreme Court erred in denying the claim of said Respondent, Henry J. Grannis, that Sections 5805 and 5806, Chapter 74, General Statutes, 1894, of the State of Minnesota, in so far as they purport to bar liens upon property sold in partition proceedings, where the liens are not paid or where, under the circumstances of the case, the proceedings taken cannot reasonably be expected to result in payment, are in conflict with the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States and as applied to this case, result in depriving the said Re-
180 spondent, Henry J. Grannis, of his said property without due process of law and contrary to the provisions of said XIV Amendment.

Wherefore, the said Respondent, Henry J. Grannis, prays that the judgment and decision of said Supreme Court of the State of Minnesota may be reversed and that he may be restored to all things which he has lost because of said judgment and decision.

HENRY J. GRANNIS,
Attorney pro se.

180½ [Endorsed:] State of Minnesota Supreme Court, April Term, A. D. 1912. Albert L. Ordean, et al., Appellants & Respondents, vs. Henry J. Grannis and Charles K. Dickerman, Appellants; Henry J. Grannis, Respondent. Assignment of Errors. Filed Jul- 12, 1912. I. A. Caswell, Clerk. Henry J. Grannis, Attorney pro se.

181 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman and the Oliver Iron Mining Company, Appellants and Respondents,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants; HENRY J. GRANNIS, Respondent.

Petition for Writ of Error.

To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

The petition of Henry J. Grannis, the above named Respondent and one of the defendants in the above entitled action, hereby sets forth that on the 11th day of July, 1912, the Supreme Court of the State of Minnesota, made and filed a final judgment herein, in favor of the above named Albert L. Ordean and others, plaintiffs in said cause and hereinabove named as Appellants and Respondents and against said Henry J. Grannis and also against the above named Charles K. Dickerman, in which final judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the said Henry J. Grannis, petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition and by reference to the records and proceedings in said cause.

That the said Supreme Court of the State of Minnesota is the highest court of said State of Minnesota in which a decision in this cause could be had.

182 Wherefore, said Henry J. Grannis, Defendant and Respondent, as aforesaid, petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Minnesota for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 11th day of July, A. D. 1912.

HENRY J. GRANNIS, *Petitioner.*

182½ [Endorsed:] State of Minnesota Supreme Court. April Term, A. D. 1912. Albert L. Ordean, et al., Appellants & Respondents, vs. Henry J. Grannis and Charles K. Dickerman, Appellants; Henry J. Grannis, Respondent. Petition for Writ of Error. Filed Jul 12, 1912. I. A. Caswell, Clerk. Henry J. Grannis, Attorney pro se.

183 State of Minnesota Supreme Court, April Term, A. D. 1912.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased; Frank Woodman and the Oliver Iron Mining Company, Appellants and Respondents,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Appellants; HENRY J. GRANNIS, Respondent.

Order Allowing Writ of Error.

On reading and considering the petition of Henry J. Grannis, one of the Defendants and the Respondent in the above entitled cause, praying that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Minnesota, to review the judgment of the Supreme Court of the State of Minnesota, in the above entitled cause, entered on the 11th day of July, 1912, and upon the filing of an assignment of errors;

It is ordered, that a writ of error be and is hereby allowed, as prayed for, to this court from the Supreme Court of the United States and that the amount of the bond, on said writ of error, be and hereby is fixed at the sum of five hundred Dollars, which writ of error and bond shall operate as a supersedeas.

Dated at St. Paul, Minn., this 11th day of July, A. D. 1912.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

183½ [Endorsed:] State of Minnesota Supreme Court, April Term, A. D. 1912. Albert L. Ordean, et al., Appellants & Respondents, vs. Henry J. Grannis and Charles K. Dickerman, Appellants; Henry J. Grannis, Respondent. Order Allowing Writ of Error. Filed Jul- 12, 1912. I. A. Caswell, Clerk. Henry J. Grannis, Attorney pro se.

184 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1912.

ALBERT L. ORDEAN et al., Appellants and Respondents,

vs.

HENRY J. GRANNIS et al., Appellants; HENRY J. GRANNIS, Respondent.

Bond on Writ of Error.

Know all men by these presents, that we, Henry J. Grannis, residing at Duluth, Minnesota, as principal, and B. E. Torinus and

R. S. Davis, residing at Stillwater, Minnesota, as sureties, are held and firmly bound unto Albert L. Ordean, Margaret Sullivan, Alfred Jaques, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as administrator and trustee under the last will of Ida Michaud, deceased, Frank Woodman and the Oliver Iron Mining Company, the Plaintiffs and Appellants in the above mentioned cause, in the sum of five hundred Dollars to be paid to said obligees, their heirs, executors, administrators, successors or assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of July, A. D. 1912.

Whereas, the above named Respondent, Henry J. Grannis, hath prosecuted a writ of error in the Supreme Court of the United States, to reverse the judgment in the above entitled cause by the Supreme Court of the State of Minnesota, against the said Henry J. Grannis;

Now, therefore, the condition of this obligation is such, that if the above named Henry J. Grannis, shall prosecute his said writ of error
to effect and answer all damages and costs if he shall fail to
185 make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

HENRY J. GRANNIS. [SEAL.]
B. E. TORINUS. [SEAL.]
R. S. DAVIS. [SEAL.]

Signed, Sealed and Delivered in presence of
W. L. PRINCE.
EMMA H. KRUEGER.

STATE OF MINNESOTA,
County of Washington, ss:

On this 11th day of July, 1912, before me a Notary Public, within and for said County, personally appeared Henry J. Grannis, B. E. Torinus and R. S. Davis, to me known to be the persons described in and who executed the foregoing bond and acknowledged that they executed the same as their free act and deed.

[SEAL.] W. L. PRINCE,
Notary Public, Washington County, Minnesota.

My Commission expires Dec. 18, 1918.

STATE OF MINNESOTA,
County of Washington, ss:

B. E. Torinus and R. S. Davis, being duly sworn, say each for himself, that he is one of the sureties above named; that he is a resident and freeholder of the State of Minnesota and worth the amount of five hundred Dollars, specified in the foregoing bond, above his debts and liabilities and exclusive of his property exempt from execution.

B. E. TORINUS.
R. S. DAVIS.

Subscribed and sworn to before me this 11th day of July, 1912.
[SEAL.] W. L. PRINCE,
Notary Public, Washington County, Minnesota.

My Commission Expires Dec. 18, 1918.

185½ [Endorsed:] State of Minnesota Supreme Court, April Term, A. D. 1912. Albert L. Ordean et al., Appellants & Respondents, vs. Henry J. Grannis et al., Appellants; Henry J. Grannis, Respondent. Bond on Writ of Error. I hereby approve the within bond and the sureties thereon. Dated July 12, 1912. Chas. M. Start, Chief Justice of the Supreme Court of the State of Minnesota. Filed Jul- 12, 1912. I. A. Caswell, Clerk.

186 In the Supreme Court of the State of Minnesota.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, JOHN G. WILLIAMS, CHRISTIANA ALSTEAD, ALICE E. BUTCHART, as Administrator and Trustee under the Last Will of Ida Michaud, Deceased, FRANK WOODMAN, and the OLIVER MINING COMPANY, Plaintiffs, Appellants,

vs.

HENRY J. GRANNIS and CHARLES K. DICKERMAN, Defendants; HENRY J. GRANNIS, Respondent.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

To The Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry J. Grannis, Plaintiff in Error herein, and Albert L. Ordean, Margaret Sullivan, Alfred Jaques, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as administrator and trustee under the last will of Ida Michaud, deceased, Frank Woodman, and the Oliver Iron Mining Company, Defendants in Error herein, the said Defendants in Error being plaintiffs and the said Plaintiff in Error, being one of the defendants in said Supreme Court of the State of Minnesota, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question
187 the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; and wherein was drawn in question

the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Henry J. Grannis, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty (30) days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 12th day of July, in the year of our Lord one thousand nine hundred and twelve.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the United States District Court
for the District of Minnesota.

Allowed by
CHARLES M. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

187½ [Endorsed:] Supreme Court of the United States. Henry J. Grannis, Plaintiff in Error, vs. Albert L. Ordean et al., Defendants in Error. Writ of Error. Filed Jul- 12, 1912. I. A. Caswell, Clerk.

188 *Certificate of Lodgment.*

SUPREME COURT, STATE OF MINNESOTA, *ss:*

I, I. A. Caswell, Clerk of the said court, do hereby certify that there was lodged with me as such Clerk on July 12th, 1912, in the matter of Albert L. Ordean vs. Henry J. Grannis et al.,

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error as herein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court at my office, in St. Paul, Minnesota, this 23d day of July, 1912.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

189 UNITED STATES OF AMERICA, *ss:*

To Albert L. Ordean, Margaret Sullivan, Alfred Jaques, Theodore T. Hudson, John G. Williams, Christiana Alstead, Alice E. Butchart, as administrator and trustee under the last will of Ida Michaud, deceased, Frank Woodman, and the Oliver Iron Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Minnesota, wherein Henry J. Grannis, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 12th day of July, A. D. 1912.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

189½ [Endorsed:] Supreme Court of the United States. Henry J. Grannis, Plaintiff in Error, vs. Albert L. Ordean et al., Defendants in Error. Citation. Due service of the within citation is hereby accepted, on behalf of the defendants in error, at Duluth, Minnesota, this 13th day of July, 1912. Jaques & Hudson, John G. Williams, William Elder, Attorneys for Defendants in Error. Filed Jul- 15, 1912. I. A. Caswell, Clerk.

190 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Minnesota, in the city of St. Paul, this 23d day of July, 1912.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 23326. Minnesota Supreme Court. Term No. 325. Henry J. Grannis, plaintiff in error, vs. Albert L. Ordean, Margaret Sullivan, Alfred Jaques, Theodore T. Hudson et al. Filed August 5, 1912. File No. 23326.

SUBJECT INDEX

Page.

Statement of the case 1
Assignment of errors 9
Jurisdiction of this Court 11
Argument on the merits 20
Necessity of notice under the 14th Amendment 20
This Court will decide for itself whether there has been such notice as to constitute due process 23
Character of the notice relied upon by the defendants in error 25
The person to be served in the partition action was Albert B. Geilfuss, Assignee 31
Where jurisdiction by publication is relied upon, the name in the published notice should be given correctly, rule of idem sonans also discussed 35
Effect of the absence of the middle initial 49
The motion for a new trial 58
Rule adopted by the state court unsound in principle, also misapplied 63

LIST OF CASES CITED

Ambs vs. Chicago, etc., Ry. Co., 44 Minn. 266 51
Anderson vs. Qualey, (Mass.) 103 N. E. Rep. 90 ..... 37, 43
Ballard vs. Hunter, 204 U. S. 241 ..... 22, 23
Barber vs. Morris, 37 Minn. 194 27
Blinn vs. Chessman, 49 Minn. 140 37
Bloomer vs. Cristler, 22 Colo. App. 238 46
Bowen vs. Mulford, 10 N. J. L. 230 56
Brown vs. St. Paul Ry. Co., 28 Minn. 506 27
Bunker vs. United Order of Foresters, 97 Minn. 361 60
Carney vs. Bingham, 51 Wash. 452 55
Central of Georgia Ry. Co. vs. Wright, 207 U. S. 127 23
Chambers vs. Baltimore & Ohio R. R. Co., 207 U. S. 142 18
Chamberlain vs. Blodgett, 96 Mo. 482 ..... 28, 40, 44, 47, 68
Chapman vs. Goodnow, 123 U. S. 540 19
Cheely vs. Clayton, 110 U. S. 701 29
City of Detroit vs. Detroit City Ry. Co., 54 Fed. 1 39
Clary vs. O'Shea, 72 Minn. 105 42
Clark vs. Butts, 73 Minn. 361 33
Colton vs. Rupert, 60 Mich. 318 40
Commonwealth vs. Buckley, 145 Mass. 181 56
Creswill vs. Knights of Pythias, 225 U. S. 246 25
Crouse vs. Murphy, 140 Pa. St. 335 57
D'Autremont vs. Anderson Iron Co., 104 Minn. 165 ..... 27, 50
Davis vs. Steeps, 87 Wis. 472 57
Dick vs. Foraker, 155 U. S. 404 62
Dutton vs. Simmons, 65 Me. 583 56
Enewold vs. Olsen, 39 Neb. 59 ..... 30, 63

LIST OF CASES CITED—Continued.

Page

Entrekin vs. Chambers, 11 Kan. 280 ..... 40, 44
Fanning vs. Krapfl, 61 Iowa 417 ..... 30, 68
Farnham vs. Thompson, 34 Minn. 330 60
First National Bank vs. Hacoda Merchantile Co. 169 Alab. 476 54
Galpin vs. Page, 18 Wall. 350 28
Garrison vs. People, 21 Ill. 535 69
Gibson vs. Foster, 135 Pac. Rep. 121 57
Godfrey vs. Valentine, 39 Minn. 336 27
Gilmore vs. Lampman, 86 Minn. 493 27
Gray vs. Larrimore, 10 Fed. Cas. 1025 29
Grober vs. Clemens, 71 Ark. 565 43
Guaranty Trust Co. vs. Green Cove Railroad Co. 139 U. S. 137 ..... 28, 29, 39
Hahn vs. Kelly, 34 Cal. 391 62
Hassell vs. Wilcox, 130 U. S. 493 27
Heberling vs. Moudy, 247 Mo. 535 46
Henderson vs. Cargill, 31 Miss. 367 69
Hodgkin vs. Boswell, 63 Oregon 589 45
Hoffman vs. Shields, 4 W. Va. 490 39
Howe vs. Thayer, 49 Iowa 154 69
Hubner vs. Reichoff, 103 Iowa 368 ..... 41, 47
Illinois Central R. R. Co. vs. Kentucky, 218 U. S. 551 ..... 14, 15
Indiana & Arkansas, etc. Co. vs. Brinkley, 164 Fed. 963 29
Jacob vs. Roberts, 223 U. S. 261 ..... 22, 24
Jewett vs. Iowa Land Co., 64 Minn. 531 27
Kansas City So. Ry. vs. Albers Comm. Co., 223 U. S. 573 25
Kaukauna Water Power Co. vs. Green Bay, etc., Co., 142 U. S. 254 19
Kentucky Union Co. vs. Kentucky, 219 U. S. 140 ..... 14, 15
Kennedy vs. Merriam, 70 Ill. 228 69
Leigh vs. Green, 193 U. S. 79 ..... 14, 16, 17
Londoner vs. Denver, 210 U. S. 373 21
Loser vs. Plainfield Savings Bank, 149 Iowa 672 ..... 51, 55
Lumberman's Ins. Co. vs. St. Paul, 82 Minn. 497 60
Mallett vs. North Carolina, 181 U. S. 589 ..... 14, 16, 17
Magoffin vs. Mandaville, 28 Miss. 354 40
Marx vs. Hanthorn, 148 U. S. 172 ..... 24, 38
McCoy's Exr. vs. McCoy's Devisees, 9 W. Va. 443 39
McCravey vs. Cox, 24 Ark. 574 69
McKay vs. Kalyton, 204 U. S. 458 ..... 14, 16
McRee vs. Brown, 45 Tex. 503 40
Meyer vs. Kuhn, 65 Fed. 705 ..... 28, 39
Miedreich vs. Lauenstein, 34 Sup. Ct. Rep. 309 ..... 19, 25
Milbra vs. Sloss-Sheffield, etc., Co. (Alab.), 62 So. Rep. 176 45
Miller vs. Keaton, 236 Mo. 694 ..... 30, 45, 63
Ming vs. Gwatkin, 6 Rand. (Va.) 551 56
Missouri, K. & T. Ry. Co. vs. Elliott, 184 U. S. 530 ..... 14, 19
Mobile & Ohio Railroad Co. vs. Tennessee, 153 U. S. 486 24
Montana ex rel Haire vs. Rice, 204 U. S. 291 19
Newby vs. Edwards, 153 N. Car. 110 54
North Carolina R. Co. vs. Zachary, 34 Sup. Ct. Rep. 305 19
Northern Commercial Co. vs. Hartke, 110 Minn. 338 53
Ohlmann vs. Clarkson Sawmill Co., 222 Mo. 62 37
Old Wayne Life Association vs. McDonough, 204 U. S. 8 21
Otterness vs. Botten, 80 Minn. 430 60
Parker vs. Parker, 146 Mass. 320 56

LIST OF CASES CITED—Continued.

	Page
Petition of Snook, 2 Hilt, (N. Y.) 466	51
Pennoyer vs. Neff, 95 U. S. 714	21
Proctor vs. Nance, 132 Am. St. Rep. 563, Note	51
Robson vs. Thomas, 55 Mo. 581	69
Roller vs. Holly, 176 U. S. 398	21, 24
Rockwood vs. Davenport, 37 Minn. 533	34
San Jose' Land & Water Co. vs. San Jose' Ranch Co., 189 U. S. 177	19
Schoenfeld vs. Bourne, 169 Mich. 139	43
Scott vs. McNeal, 154 U. S. 34	21, 23
Scarry vs. Lumber Co., 233 Mo. 686	44
Settlemier vs. Sullivan, 97 U. S. 444	29
Simon vs. Craft, 182 U. S. 427	22, 24
Skelton vs. Sackett, 91 Mo. 377	35, 37
Slocum vs. McLaren, 109 Minn. 49	60
Southern Pacific Co. vs. Schuyler, 227 U. S. 601	25
State vs. Lautenschlager, 23 Minn. 290	60
State vs. Higgins, 60 Minn. 1	51
Steinman vs. Jessee, 108 Va. 567	42
Stewart vs. Colter, 31 Minn. 385	51
Sullivan vs. Texas, 207 U. S. 416	14, 16
Thomas vs. Desney, 57 Iowa 61	69
Thompson vs. Bickford, 19 Minn. 17	34
Thornily vs. Prentice, 121 Iowa 89	68, 69
Troyer vs. Wood, 96 Mo. 478	47
Twining vs. New Jersey, 211 U. S. 78	21
Wester vs. Hedberg, 68 Minn. 434	60
Whelen vs. Weaver, 93 Mo. 430	40
Wicker vs. Junkins, 49 Tex. App. 366	56
Wilcher vs. Robertson, 78 Va. 602	62
Willard vs. Marr, 121 Minn. 23	53
Windsor vs. McVeigh, 93 U. S. 274	22, 27
Wingen vs. May, 92 Minn. 255	60

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 325

HENRY J. GRANNIS, Plaintiff in Error,

vs.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, Et Al.

No. 326.

HENRY J. GRANNIS, Plaintiff in Error,

vs.

ROBERT B. WHITESIDE, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, Et Al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE

The parties in case No. 326 have entered into a stipulation, which is on file, waiving the printing of the record

in that case, and agreeing that the same may be heard upon the printed record in case No. 325, and that said two cases may be argued together as one case and that case No. 326 shall abide and be governed by the decision and disposition of case No. 325. The only substantial difference in the record in case No. 326 from that in case No. 325 is in the description of the property involved and in the names of certain of the Defendants in Error.

On the 8th day of November, 1895, and for some time prior thereto, one John McKinley was the owner of an undivided one-fifth of the lands described in the pleadings, all situated in the County of St. Louis, State of Minnesota (R 19). Prior to said date, and on the 4th day of January, 1894, one Albert B. Geilfuss, Assignee, recovered a judgment for the sum of $2,854.02, against said John McKinley, in the District Court of said County of St. Louis, which judgment was duly entered in the judgment book and appeared in the judgment roll in the name of Albert B. Geilfuss, Assignee, and on the 5th day of January,, 1894 was docketed, by the Clerk of said District Court, as in favor of Albert Geilfuss, Assignee, as judgment creditor and against said John McKinley, as judgment debtor (R 21). This judgment, upon the docketing thereof, became a lien upon the aforesaid interest of said McKinley in said lands and, on said 8th day of November, 1895, was a lien thereon (R 20). This is the judgment under which the Plaintiff in Error claims title to said undivided one-fifth of said lands, formerly owned by said John McKinley, by virtue of certain execution and redemption proceedings and mesne conveyances, hereinafter mentioned. Albert B. Geilfuss, Assignee, also recovered another judgment against John McKinley, which last mentioned judgment was for the sum of $2,125.60, and was duly entered and docketed on the 10th day of January, 1894, in the name of Albert B. Geilfuss, Assignee, (R 23). This judgment of January 10th, 1894, also became a lien

upon the interest of said McKinley in said lands, but the Plaintiff in Error claims no rights thereunder.

On the said 8th day of November, 1895, one George A. Elder, the owner of an undivided one-fifth interest in said lands, commenced a partition suit, in the District Court of St. Louis County, against Mesaba Land Company, John McKinley and the other owners of the fee of said lands and also against certain parties having judgment or other liens upon said lands (R 21). Said suit was brought under the provisions of Chapter 74, Gen. Stats. of Minnesota, 1894, and the sole purpose thereof was to partition the lands involved in the two actions now before this Court or in case a partition could not be had, then to have the lands sold and the proceeds of the sale distributed among the parties thereunto entitled (R 22).

In said partition action, Albert B. Geilfuss, Assignee, the owner of said judgments, was not named as a defendant in the summons or other files or records and was not personally served and did not appear in said action, nor was the name Albert Geilfuss, Assignee, among the names of the defendants in said action and he was not personally served and did not appear therein (R 23).

The names Albert Guilfuss, Assignee, and Albert B. Guilfuss, (without the designation Assignee), were among the names of the defendants in said partition action, in the summons and other proceedings therein, and the summons in said action was served upon Albert Guilfuss, Assignee, and upon Albert B. Guilfuss, by publication thereof and not otherwise and these parties did not appear in said action (R 23). Pursuant to the laws of the State, providing for service of summons upon non-residents, by publication thereof, in certain cases, being Sections 5204 and 5205, Gen. Stats. of Minnesota, 1894, a copy of the summons was mailed to Albert Guilfuss, Assignee, at Milwaukee, Wisconsin, and a copy thereof was also mailed to

Albert Guilfuss at the same place; the Sheriff of St. Louis County made a return that these parties could not be found in his County; one of the attorneys for the plaintiff, in the partition suit, filed an affidavit therein stating that he believed the parties designated in the summons by the names Albert Guilfuss, Assignee, and Albert B. Guilfuss, were not residents of the State of Minnesota and that he had mailed copies of the summons to each of them, at Milwaukee, Wisconsin, and thereafter the summons, containing the names Albert Guilfuss, Assignee, and Albert B. Guilfuss, was published for the required time in a newspaper at Duluth, Minnesota (R 23-24).

Upon the aforesaid service of summons, by publication, upon Albert Guilfuss, Assignee, and Albert B. Guilfuss and service by publication or otherwise upon the other parties named as defendants (but not including Albert B. Geilfuss, Assignee,) the said District Court of St. Louis County, on the 5th day of May, 1899, entered a judgment, in said partition action, directing that said lands be sold to the highest bidder and the division of the proceeds of the sale among the parties entitled thereto (R 24). This judgment is contained in the record, and is attached as an exhibit, to the findings of the District Court in the pending action (R 30). It will be noted that this judgment contains no recital of service upon or jurisdiction over any of the defendants in the partition case. The lands were sold accordingly and the sale confirmed and the Defendants in Error, other than the Oliver Iron Mining Company, succeeded to whatever interest the purchaser acquired upon such sale (R. 24).

The said judgment of Albert B. Geilfuss, Assignee, against John McKinley for $2,854.02, was in the month of October, 1901 assigned to one Timlin and by him to one Buell, who caused execution to be issued and the levy upon and sale thereunder of said undivided one-fifth inter-

est of said John McKinley in the lands herein involved and certain other lands (R 25).

The execution sale took place on the 30th of December, 1901, and thereafter and within the time provided by law, the grantor of the Plaintiff in Error, a subsequent judgment creditor of said McKinley, redeemed the lands sold upon said execution sale, including the said one-fifth interest in the lands involved herein, and thereby succeeded to the title of the purchaser, at said execution sale, and the Plaintiff in Error has acquired and holds the title of said redemptioner (R 25-26-27).

It thus appears that the situation of the parties and of the title to the lands herein involved, at the time of the commencement of the action, which resulted in the judgment of the District Court of St. Louis County, dated December 27th, 1911, (R 59) was as follows: In case No. 325, the Defendants in Error, plaintiffs in the District Court of St. Louis County, claimed to be the owners of the fee of the land, consisting of one government lot, involved in said case, by virtue of the sale thereof, in said partition action, and various masne conveyances from the purchaser at said sale, subject to the mining lease held by the Defendant in Error, Oliver Iron Mining Company, and the Defendants in Error in case No. 326 claim title to the lands involved in that case, under said sale in the partition action and various mesne conveyances from the purchaser at said sale, but not subject to said mining lease, while the Plaintiff in Error, one of the defendants in said District Court, claimed title to an undivided one-fifth of all of said lands, involved in said cases Nos. 325 and 326, free from the above mentioned mining lease, and this had been the situation and claims of the respective parties, for many years, as the record shows. All of said lands were vacant and unoccupied. Thereupon the Defendants in Error, in said respective cases, commenced an action in said District

Court of St. Louis County, Minnesota, as plaintiffs, against the Plaintff in Error and another party, as defendants, for the purpose of determining adverse claims, pursuant to Section 4424, Revised Laws of Minnesota 1905, which reads as follows:

> "Any person in possession of real property by himself or his tenant, or any person having or claiming title to vacant or unoccupied real property, may bring an action against any person who claims an estate or interest therein or lien thereon, adverse to him, for the purpose of determining such adverse claim and the rights of the parties respectively."

In the trial court each party, so far as this one-fifth interest is concerned, relied upon a legal title, as distinguished for an equitable claim or title, the plaintiffs (defendants in error here) upon the sale in the partition suit and the defendant Grannis (plaintiff in error here) upon the execution sale under the Albert B. Geilfuss judgment of $2,854.02. In the pleadings, all that the plaintiffs were required to do and all that they did do, in the first instance, was to set up their title by general allegation of ownership (R 2), and all that the Plaintiff in Error, as defendant, was required to set out in his answer, so far as this particular one-fifth interest is concerned (there being another one-fifth interest claimed by the Plaintiff in Error and his codefendant in said action in the District Court) was to allege generally his ownership of said one-fifth interest, claimed by him, and this was done (R 7). These pleadings are all in accordance with the practice, under said statute, as established by the decisions of the Supreme Court of the State of Minnesota.

The trial in the District Court of St. Louis County resulted in findings of fact being made by the trial judge, covering, among other things, substantially the facts here-

inabove set forth, and as conclusions of law, the trial court found and decided that in case No. 325, the Defendants in Error, other than the Oliver Mining Company, plaintiffs in said District Court, were the owners, in fee simple of an undivided four-fifths of the lands herein involved, subject to the aforesaid mining lease in favor of said Olver Iron Mining Company, and that the Plaintiff in Error, defendant in said District Court, is the owner, in fee simple, of an undivided one-fifth of said lands and that said one-fifth interest was not subject to said mining lease, (R 29) and in case No. 326, said District Court, as conclusions of law found and decided that the Defendants in Error, plaintiffs in said District Court, are the owners in fee simple of an undivided four-fifths of the lands herein involved and that the Plaintiff in Error, defendant in said District Court, is the owner in fee simple of an undivided one-fifth of said lands. A motion for a new trial, made in said District Court, by the Defendants in Error, was denied (R 56). The Judge of the trial Court filed, with the findings, a memorandum, which, so far as relates to the matters subject to review in this Court, is found in the Record at pages 39 to 43 and in denying the motion for a new trial, the said Judge filed an additional memorandum, which is found in the Record at pages 57 to 59.

The District Court sustained the title of the Plaintiff in Error, derived through the enforcement of the lien of said Geilfuss judgment, and declined to hold, as contended by the Defendants in Error, that the lien of said judgment had been cut off, by the proceedings in the partition action, placing its decision upon the ground that the Court, in the partition case, did not acquire jurisdiction of said Albert B. Geilfuss, Assignee; that service by publication upon "Albert Guilfuss, Assignee," did not bind said "Albert B. Geilfuss, Assignee," or affect the lien of his judgment; that the surnames "Geilfuss" and Guilfuss" are different and distinct names and are not within the rule of

idem sonans assuming that such rule may properly be invoked in cases of service of process by publication. In arriving at its decision, the trial Court did not find it necessary to consider, as an independant proposition, the effect of the absence of the middle initial "B" from the name Albert Guilfuss, Assignee, appearing in the published summons (R 40). Judgment was entered, pursuant to said findings and decision (R 59) and from this judgment the Defendants in Error, plaintiffs in said District Court, took an appeal to the Supreme Court of the State of Minnesota, and this appeal was disposed of at the April, 1912, Term of said Court, and in its decision said State Supreme Court reversed the said judgment in favor of the Plaintiff in Error (R. 67).

The Supreme Court of the State of Minnesota, while conceding that the question of the sufficiency of the service, to confer jurisdiction, was not free from doubt and agreeing with the District Court that the surnames Geilfuss and Guilfuss are not *idem sonans,* decided that the names "Albert Guilfuss, Assignee," and "Albert B. Geilfuss, Assignee," looked sufficiently alike in print and when subjected to a visual test, to warrant the conclusion that the service of the summons by publication upon "Albert Guilfuss, Assignee" was binding upon "Albert B. Geilfuss, Assignee," and that such service meets the requirements of due process of law (R 68-72).

The judgment in the partition case was attacked by the Plaintiff in Error, both in the State District and Supreme Courts, upon the further ground that the court exceeded its jurisdiction in directing a sale, in the partition action, because the liens upon the premises exceeded the value thereof and the state statutes prohibit a sale under such circumstances. The State Supreme Court conceded, impliedly at least, that this objection would have been a valid defense, in the partition action, but that the

judgment was not open to collateral attack upon this ground (R 72-73). As this question relates solely to the application and construction of state statutes, and involves no Federal question, the same is not before this Court.

Before the entry of judgment in the Supreme Court of the State of Minnesota and after the filing of the original opinion of that Court, the Plaintiff in Error made due and timely application for a rehearing (R 73-83) and in his petition and amended petition for such rehearing set forth, with particularity, his claim that the decision of said Supreme Court, deprives him of his property without due process of law and contrary to the Fourteenth Amendment to the Constitution of the United States, in that said Alber B. Geilfuss, Assignee, the owner of the judgment under which the Plaintiff in Error claims title, was not made a party to or served with process in said partition action. The petition for rehearing was entertained, considered, passed upon and denied by said State Supreme Court, in an opinion found in the Record at page 84.

Thereafter judgment was entered in the Supreme Court of the State of Minnesota, pursuant to said original and supplemental opinions (R 86) and the case comes here, upon Writ of Error, to review said judgment.

The case in the State Court is reported in 118 Minn. 117.

ASSIGNMENT OF ERRORS

The Supreme Court of the State of Minnesota erred:

1. In reversing the judgment of the District Court of St. Louis County, Minnesota, wherein and whereby it was adjudged and decreed that the Plaintiff in Error is the owner in fee simple of an undivided one-fifth of the lands, the title to which is involved in these actions.

2. In holding and deciding that, in a certain partition action, commenced in the District Court of St. Louis County, Minnesota, on the 8th day of November, 1895, wherein one George A. Elder was plaintiff and Mesaba Land Company, John McKinley and others were defendants, and which involved the lands herein involved, jurisdiction was obtained of Albert B. Geilfuss, Assignee, a non-resident of the State of Minnesota, and the owner of a judgment against said John McKinley, for the sum of $2,854.02, docketed in said District Court of St. Louis County, January 5th, 1894, and a lien upon the said interest of said McKinley in said lands, by the service of the summons in said partition action, by publication thereof, and not otherwise, in which summons as published and in all the files, records and proceedings in said partition action, appeared the name *Albert Guilfuss, Assignee*, among the names of the defendants therein, but in which summons the name *Albert B. Geilfuss, Assignee*, did not appear, nor did said name appear in any of the other files, records or proceedings in said partition action, and in which action there was no appearance by Albert B. Geilfuss, Assignee, nor by Albert Guilfuss, Assignee.

3. In its decision and judgment, reversing said judgment of said District Court of St. Louis County, and holding that the aforesaid service of summons, by publicaton, was binding upon said Albert B. Geilfuss, Assignee, and operated to cut off the lien of his said judgment upon the lands involved herein, in that said decision and judgment deprives the Plaintiff in Error, of his said property, to-wit; an undivided one-fifth of said lands, without due process of law and contrary to the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States.

4. In denying the claim of the Plaintiff in Error, that jurisdiction could not be obtained of said Albert B.

Geilfuss, Assignee, a non-resident, by publication of the summons, unless his true name or, at least, a name which is the same as his true name, within the rule of *idem sonans* was inserted in the summons and other proceedings, and to hold otherwise, which said Supreme Court of the State of Minnesota did and applied a test of similarity of appearance in print to names essentially different and distinct was not in compliance with, but on the contrary was in contravention of the due process of law provisions of the XIV Amendment to the Constitution of the United States, the protection of which the Plaintiff in Error invoked in sad State Supreme Court and here invokes.

JURISDICTION

The jurisdiction of this Court is invoked, pursuant to the provisions of Section 237 of The Judicial Code, being a re-enactment of Section 709 of the Revised Statutes, upon the ground that the decision and judgment of the Supreme Court of the State of Minnesota, to which Court the Writ of Error is directed, reversing the decision of the District Court of St. Louis County, Minnesota, in favor of the Plaintiff in Error, deprives him of his property, without due process of law and contrary to the provisions of Section 1, Article Fourteen of the Amendments to the Constitution of the United States. As shown by the statement of facts, the Plaintiff in Error claims title to an undivided one-fifth of the lands involved herein, under an execution sale of said lands, upon a judgment in favor of Albert B. Geilfuss, Assignee, which judgment was a lien upon said interest in said lands. The decision and judgment of said State Supreme Court assumed to bar the lien of this judgment and cut off the title of the Plaintff in Error, by holding that the service of summons, by publication directed to Albert Guilfuss, Assignee, in the partition action mentioned in the statement of facts, was suf-

ficient to bind Albert B. Geilfuss, Assignee, the then owner of said judgment, while the Plaintiff in Error claims that said Albert B. Geilfuss, Assignee, was not a party to said partition action and that there was no service of summons in said action upon him, and that said decision and judgment of said State Supreme Court deprives the Plaintiff in Error, claiming through and under said Albert B. Geilfuss, Assignee, of his said property, without due process of law.

We submit that the record shows that a Federal question was presented and passed upon and necessarily involved, in the State Supreme Court, upon the following grounds:

First. After the filing of the original opinion in the State Supreme Court and before the entry of judgment therein, the Plaintiff in Error applied for a rehearing and in the petition for rehearing and in the amended petition set out, with particularity, his claim of protection under the Fourteenth Amendment to the Constitution of the United States, together with the assertion of the violation of the terms of said Fourteenth Amendment, as indicated by said original opinion. (R 77). This petition for rehearing was entertained and considered by the State Supreme Court and the claims therein advanced by the Plaintiff in Error were denied, in a supplemental opinion filed by the Court, in each of these cases.

Second. A Federal question is necessarily involved and was really passed upon, in the opinion and decision of the State Supreme Court and need not be specially raised, in order to confer jurisdiction to review the judgment of said State Supreme Court, entered pursuant to its opinion and decision.

Considering these propositions, in the order stated, it may be noted that the filing of the petition for rehearing

in the State Supreme Court was the first opportunity the Plaintiff in Error had, under the state practice, to assert his claims, under the Federal Constitution. The title to the lands, relied upon by the Plaintiff in Error, was a legal title, and, ,as pointed out in the statement of facts, his proper pleading, in the trial Court, was a general allegation of ownership. The decision of the trial Court was in his favor, and the Plaintiff in Error as respondent in the State Supreme Court, was not, of course, in position to file any assignment of errors. The Plaintiff in Error had no opportunity, therefore, of calling to the attention of the State Court, by any formal document which could properly be made a part of the record, the grounds of reliance upon the Federal Constitution, until the filing of the petition for rehearing. His brief in the State Court calling attention to the Federal question, could not as we understand the practice, be made part of the record or be looked to by this Court to sustain jurisdiction. The record shows the filing of the original petition for rehearing, on the 15th day of June, 1912, (R 73) and of the amended petition on the 26th day of June, 1912, (R 77), and the filing of the opinion passing upon and denying the petition for rehearing, on the 11th day of July, 1912 (R 84) and the entry of judgment in said State Supreme Court on the 11th day of July, 1912 (R 86). It thus appears that the petition for rehearing was filed, considered and the Federal question passed upon before the entry of judgment, in the State Supreme Court.

In paragraphs 1 to 5, inclusive, of the amended petition for rehearing (R 77-81), is set out specifically the claims of conflict of the original opinion of the State Supreme Court with requirements of of the due process of law provisions of the Fourteenth Amendment and, as above indicated, after the filing of this opinion and before judgment, the Court filed a supplemental opinion, in response to the application for rehearing. This opinion is

contained in the Record on page 84 and is as follows:

> "In a petition for reargument filed by defendant Grannis, it is suggested that the necessary effect of the decision of this court is to deprive him of his property without due process of law, contrary to the provisions of Article XIV of the Amendments to the Constitution of the United States, though the question was not specifically decided. We necessarily hold against this contention of defendant, and so interpret the decision."

Then follows a formal direction denying the petition for reargument and thereafter the judgment was entered, to which the Writ of Error is directed.

Upon this state of the record, we make the claim, with all due respect, that the Federal question was properly presented to and passed upon by the State Court, so as to support the jurisdiction of this Court, to review the judgment of the State Court, as is shown by the decisions of this Court in, among others, the following cases:

Mallett vs. North Carolina, 181 U. S. 589.

Missouri, K. & T. Ry. Co. vs. Elliott, 184 U. S. 530.

Leigh vs. Green, 193 U. S. 79.

McKay vs. Kalyton, 204 U. S. 458.

Sullivan vs. Texas, 207 U. S. 416.

Disconto Gesellschaft vs. Umbreit, 208 U. S. 570.

Illinois Central R. R. Co. vs. Commonwealth of Kentucky, 218 U. S. 551.

Kentucky Union Co. vs. Commonwealth of Kentucky, 219 U. S. 140.

In the case of Kentucky Union Co. vs. Commonwealth of Kentucky, 19 U. S. 140, *supra*, the record of the case in this court shows that a petition for a rehearing was filed, calling attention to the failure of the State Court to rule on certain Federal quesions, as requested in the original brief of counsel. The Court filed an order overruling the petition for rehearing and in that connection discussed, briefly, the points raised, concluding with these words: "In none of these contentions do we concur."

In the opinion handed down by this Court, in the case last mentioned, after referring to the fact that no mention of a Federal question appears in the record, until a petition for a rehearing was filed in the State Supreme Court, Mr. Justice Day,, speaking for the Court, used the following language (p. 158):

> "In the opinion upon the petition for a rehearing, the Court of Appeals announced that it found nothing in the statute which deprived the owner of due process of law within the meaning of the 14th Amendment. The court having thus considered the Federal question, the objection is open here."

In the case of Illinois Central R. R. Co. vs. Commonwealth of Kentucky, 218 U. S. 551, *supra*, the record, in this Court, shows that the State Court, in disposing of the petition for rehearing, calling attention to certain Federal questions, used the following language, so far as any reference is made to such questions; "No right of appellant under the 14th Amendment to the Constitution of the United States is violated by the decision."

Referring to the question of jurisdiction, Mr. Justice Hughes, speaking for the Court used the following language, in the above mentioned case (p. 556):

> "The Illinois Central Company petitioned for a rehearing, and presented the Federal questions now

urged under the Fourteenth Amendment of the Constitution of the United States. The Court entertained the petition and extended its opinion, holding that no right of the appellant under the Fourteenth Amendment had been violated by the decision. Thereupon this writ of error was brought, and, as the state court passed upon the Federal questions, this court has jurisdiction. Mallett v. North Carolina, 181 U. S. 589, Leigh v. Green, 193 U. S. 79."

In the case of Sullivan vs. Texas, 207 U. S. 416, *supra*, this Court speaking through Mr. Justice Brewer, used the following language, with respect to the question of its jurisdiction (p. 422):

"The constitutional question, although not raised theretofore, was distinctly presented in the petition to the Court of Civil Appeals for a rehearing, was considered by that court and decided adversely to the Plaintiff in Error. This court therefore has jurisdiction."

In the case of McKay vs. Kalyton, 204 U. S. 458, *supra*, the Court, speaking through its present Chief Justice, said (p. 463):

"It is contended that we are without jurisdiction because no title, right, or immunity was specially set up or clamed under any Federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States and that the right to the immunity so asserted under an act or acts of Congress was expressly considered and denied by the State Court. True it is that the immunity which was asserted was first claimed in a petition for rehearing;

but, as the question was raised, was necessarily involved, and was considered and decided adversely by the state court, there is jurisdiction. Leigh v. Green, 193 U. S. 79."

In the case of Leigh vs. Green, 193 U. S. 79, *supra*, Mr. Justice Day, speaking for the Court disposed of the motion to dismiss, using the following language (p. 85):

> "A motion is made to dismiss because the claim of impairment of a right secured by the Fourteenth Amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the supreme court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska supreme court to decide the claim theretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Be this as it may, the supreme court of Nebraska entertained the motion and decided the Federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing. Mallett v. North Carolina, 181 U. S. 589."

We maintain, therefore, with much confidence, that we have fully met the requirements of this Court, with respect to asserting and having considered, in the lower Court, the grounds of Federal jurisdiction.

We make the further point, as above indicated, though we consider the first point controlling, that the Supreme Court of the State of Minnesota, may be said to have considered and passed upon the service of the summons in

the partition action, as being sufficient to comply with the due process of law provisions of the Fourteenth Amendment to the Federal Constitution, though the Federal Constitution was not mentioned, in so many words, in the original opinion. In said opinion occurs this language: "While substituted service by publication is purely statuory and in derogation of the common law, while strict compliance with the statutory provisions is necessary to *constitute due process of law,* this does not mean that errors in the spelling of proper names are always fatal defects." (R. 71).

The court then proceeds to discuss what errors in the spelling of proper names, in cases of substituted service, may be fatal or otherwise, and concludes that the name used in the published notice looks sufficiently like the true name to uphold the service. That the Court had in mind, in this connection, the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States, is made apparent by its supplemental opinion, filed on the motion for rehearing, wherein it is stated that the court interprets its original opinion as holding against the claim of violation of said constitutional provsions.

We suggest that this situation brings the pending case within the scope of the decision of this Court, in the case of Chambers vs. Baltimore & Ohio R. R. Co., 207 U. S. 142, from the opinion in which case the following quotation is made (p. 148):

> "The defendant objects to our jurisdiction to reexamine the judgment because the Federal question was not properly and seasonably raised in the courts of the state. But it clearly and unmistakably appears from the opinion of the supreme court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment

rendered. This is enough to give this court the authority to re-examine that question on writ of error. San Jose' Land & Water Co. v. San Jose' Ranch Co. 189 U. S. 177, Montana ex rel. Haire v. Rice, 204 U. S. 291."

See also: North Carolina R. Co. vs. Zachary, 34 Sup. Ct. Rep. 305 (Decided Feb. 2, 1914).

Miedreich vs. Lauenstein, 34 Sup. Ct. Rep. 309. (Decided Feb. 2, 1914).

We suggest the further view that the question, as to whether Albert B. Geilfuss, Assignee, was made a party to the partition case or served with summons therein, necessarily involved the decision, by the State Supreme Court, that the due process of law provisions of the Fourteenth Amendment to the Constitution were complied with, and, in disposing of the case, the State Supreme Court necessarily passed upon this Federal question and the same is left open for review here, even if it had not been specifically raised in the lower Court. In support of this proposition we refer the Court to

Kaukauna Water Power Co. vs. Green Bay, etc. Co., 142 U. S. 254,

Missouri, Kansas & Texas Ry. Co. vs. Elliott, 184 U. S. 530,

San Jose' etc. Co. vs. San Jose' Ranch Co., 189 U. S. 177,

Haire vs. Rice, 204 U. S. 291,

Chapman vs. Goodnow, 123 U. S. 540.

ARGUMENT ON THE MERITS

I.

In order to cut off the lien of the judgment owned by Albert B. Geilfuss, Assignee, it was necessary that he be served with summons in the partition action and this right to notice was secured to him by the Fourteenth Amendment to the Constitution of the United States, and is available to the Plaintiff in Error, as his successor in interest.

The judgment in favor of said Albert B. Geilfuss, Assignee, and against John McKinley, under which the Plaintiff in Error claims title, was docketed and became a lien upon the McKinley one-fifth interest in the lands herein involved on the 5th day of January, 1894, and the partition action was commenced on the 8th day of November, 1895. The statute of the State of Minnesota, with respect to judgment liens, in force at the time of the docketing of said judgment, being section 5425 of the General Statutes, 1894, was as follows:

> "On filing a judgment-roll, upon a judgment requiring the payment of money, the judgment shall be docketed by the clerk of the court in which it was rendered, and in any other county, upon filing in the office of the clerk of the district court of such county a transcript of the original docket; and thereupon the judgment from the time of docketing the same, becomes a lien on all the real property of the debtor in the county, owned by him at the time of the docketing of the judgment, or afterward acquired; said judgment shall survive, and the lien thereof continue, for the period of ten years, and no longer."

The Supreme Court of the State of Minnesota proceeded upon the assumption of the necessity of notice to said Albert B. Geilfuss, Assignee, before the lien of his

judgment, a vested property right, could be barred, and in its opinion in the Ordean case, (R. 69) used this language:

> "The trial court held that no jurisdiction was acquired in the partition suit over the judgment lien of Albert B. Geilfuss, Assignee. If this is correct, it is clear that the lien of this judgment on the McKinley interest was not affected by the decree in the action, and that the subsequent sale of that interest under execution on the judgment gave good title thereto to the purchaser. If on the other hand the court acquired such jurisdiction, the McKinley interest in the lands passed to the purchaser at the partition sale and is owned by the plaintiffs."

We will not undertake an extensive citation of authorities in support of the proposition that the lien of this judgment could not be controlled or cut off, without notice to the record owner thereof. This involves the fundamental right to notice and hearing, secured by the provisions of the Fourteenth Amendment to the Constitution of the United States, which has been many times and under various circumstances considered by this Court.

In the case of Twining v. New Jersey, 211 U. S. 78, Mr. Justice Moody, speaking for the Court, used the following language and cited certain decisions of this Court, with respect to the requirement of notice under the Fourteenth Amendment (p. 110):

> "Due process requires that the court which assumes to determine the rights of the parties shall have jurisdiction, *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, *Hovey* v. *Elliott*, 167 U. S. 409; *Roller* v. *Holly*, 176 U. S. 398; and see *Londoner* v. *Denver*, 210 U. S. 373."

In the case of Jacob v. Roberts, 223 U. S. 261, involving the sufficiency of the service of a summons by publication, under the statutes of the State of California, where such service was attacked upon the ground that the same violated the due process of law provisions of the Fourteenth Amendment, Mr. Justice McKenna, speaking for the Court, used this language (p. 265):

> "The assignments of error all express the contention that the trial court was without jurisdiction to render the judgment against plaintiffs in error, and that hence their property has been taken without due process of law."
>
> "Undoubtedly, as contended by plaintiffs in error, the essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice. *Simon* v. *Craft*, 182 U. S. 427. But personal notice is not in all cases necessary. There may be, and necessarily must be, some form of constructive service. *Ballard* v. *Hunter*, 204 U. S. 241."

In the case of Windsor v. McVeigh, 93 U. S. 274, Mr. Justice Field, delivering the opinion of the Court, used the following language (p. 277):

> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter."

II.

This court will decide for itself whether there has been such notice as to constitute due process.

Mr. Justice Day, delivering the opinion of the Court in the case of Central of Georgia Ry. Co. v. Wright, 207 U. S. 127, referring to the necessity of notice, in proceedings to collect taxes upon omitted property, uses this language (p. 137):

> "It would be impossible to reconcile the different holdings in the state courts upon this subject. One class holds that upon the assessment of omitted property the taxpayer has no right to be heard, having by his failure to return submitted himself to 'the doom of the assessor.' Another class holds that in such cases there must be an opportunity to be heard before the taxpayer can be thus assessed, and that to deny him such right as a penalty for failure to return is a denial of due process of law secured to the taxpayer by many state constitutions as well as the Fourteenth Amendment of the Constitution of the United States."
>
> "Of course, this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining this question for itself."

We quote the language of Mr. Justice McKenna, delivering the opinion of the Court, in the case of Ballard v. Hunter, 204 U. S. 241, (p. 260):

> "What the statute required was for the Supreme Court (of the State) to determine; whether, as determined, it constituted due process is for us to decide."

Referring to the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States, Mr. Justice Gray, delivering the opinion of the Court, in the case of Scott v. McNeal, 154 U. S. 34, used this language (p. 45):

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attrill,* 146 U. S. 657, 683, 684; *Mobile & Ohio Railroad* v. *Tennessee,* 153 U. S. 486, 492-495."

This Court has practically applied the rule stated at the opening of this sub-division, in the following, among other cases, and has determined for itself, in the particular case under consideration, whether there had been notice in compliance with the due process of law requirements of the Fourteenth Amendment.

Marx v. Hanthorn, 148 U. S. 172,

Roller v. Holly, 176 U. S. 398,

Simon v. Craft, 182 U. S. 427,

Jacob v. Roberts, 223 U. S. 261.

The holding of the State Supreme Court that the court, in the partition case, obtained jurisdiction of Albert B. Geilfuss, Assignee, by service of the summons by publication, was a conclusion of law and not a finding of fact; or, stated in a different way, was a conclusion which the Su-

preme Court arrived at from the findings of fact of the District Court. Such conclusion is not binding upon this Court.

Kansas City So. Ry. v. Albers Comm. Co., 223 U. S. 573, 591,

Creswill v. Knights of Pythias, 225 U. S. 246, 261,

Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611,

Miedreich v. Lauenstein, 34 Sup. Ct. Rep. 309, and decisions cited in these cases.

III.

The character of the notice relied upon by the defendants in error to defeat the title of the plaintiff in error.

As pointed out in the statement of facts, there was no personal service of summons upon Albert B. Geilfuss, Assignee, in the partition action, and he did not make any appearance therein and his name was not included among the defendants in the summons or other proceedings in said action (R. 21-23). In order to overcome the title claimed by the Plaintiff in Error to one-fifth interest in the lands in question, the Defendants in Error relied, exclusively, upon the judgment and proceedings in the partition action of Elder v. Mesaba Land Co., et al., wherein, among the defendants named in the summons and other proceedings occurred the names of Albert Guilfuss, Assignee, and Albert B. Guilfuss, (without the designation, Assignee), (R. 21). The only service made upon the parties so named was by publication of the summons and there was no appearance (R. 23). The Defendants in Error, in producing and relying upon the judgment and proceedings in the partition

action, were necessarily confronted with the proposition as to whether the court had jurisdiction to render said judgment and as to whether it was binding upon said Albert B. Geilfuss, Assignee, the owner of the judgment lien, for, within the rule stated by this Court in Williamson v. Berry, 8 How. 495, 540, it is a "well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings."

Section 5771 of Chap. 74, Gen. Stats. of Minnesota, 1894, governing partition actions, and in force at the time the partition action in question was commenced, reads as follows:

> "The summons shall be addressed *by name* to all the owners and lien-holders who are known, and generally to all persons unknown, having or claiming an interest in the property."

Albert B. Geilfuss, Assignee, was a known lien holder, as the judgment was entered in his name (R. 23). The statute, therefore, required that he be designated "by name" in the partition action.

The proceedings relating to the service of the summons, by publication, upon the defendants designated as Albert Guilfuss, Assignee, and Albert B. Guilfuss, are set forth in the Record at pages 23 and 24.

Under the decisions of the Supreme Court of the State of Minnesota, service of process by publication is a purely statutory proceeding, in derogation of the common law, and strict compliance with the statutory authorization is necessary.

Barber v. Morris, 37 Minn. 194,

Brown v. St. Paul Ry. Co., 38 Minn. 506,

Gilmore v. Lampman, 86 Minn. 493.

The Supreme Court of the State of Minnesota also holds that it will not be presumed that the court acquired jurisdiction by substituted service unless such service is affirmatively shown, nor will it be presumed that other service was made than that shown by the record.

Godfrey v. Valentine, 39 Minn. 336,

Jewett v. Iowa Land Co., 64 Minn. 531,

Holmes v. Loughren, 97 Minn. 83.

In the case of d'Autremont v. Anderson Iron Company, 104 Minn. 165, the court held that, in a partition action, jurisdiction was not acquired of George W. Leslie, a judgment lien holder, by service of summons, by publication, upon George H. Leslie, and that parties claiming the land under an execution sale issued upon the George W. Leslie judgment acquired good title against the purchaser at the partition sale. In that case the court used this language (p. 167):

> "Though the partition suit was a proceeding in rem, the mere fact that the court acquired jurisdiction over the subject-matter thereof, the land, did not authorize it to adjudicate the rights or interest of parties, in the absence of proper service of summons upon them." Citing, among other cases, Windsor v. McVeigh, 93 U. S. 277; Hassall v. Wilcox, 130 U. S. 493.

On pages 169 and 170 in the d'Autremont case, the court used this language:

> "The statute authorizing this form of process (publication) is in derogation of the common law and the mode prescribed must be strictly pursued. This method of acquiring jurisdiction and adjudicating the rights of parties constitutes due process of law only when the statutes providing therefor have been fully and completely complied with."

We suggest that the language of the Court, in the d'Autremont case, describing the partition suit as "a proceeding in rem" may not be strictly accurate. A partition action brought under the provisions of the Minnesota statutes is not an action against the whole world but against certain known and named defendants and others not known but described and has to do with the disposition of certain described property to the extent of the interest therein of the parties to the suit. But however the action may be characterized, the necessity of service upon or appearance by the parties holding interests in the land or liens thereon is established, so far as Minnesota is concerned, by the d'Autremont case as well as by the decision of the State Supreme Court in the case at bar. See also, Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 137; Chamberlain v. Blodgett, 96 Mo. 482; Meyer v. Kuhn, 65 Fed. 705, 712.

The decision of the Supreme Court of Minnesota, with respect to the strict construction of the statutory requirements in cases of substituted service, are in harmony with the decisions of this and other courts.

Mr. Justice Field, speaking for the Court, in the case of Galpin v. Page, 18 Wallace, 350, 369, said, among other things:

> "When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon

such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every State in the Union."

See also:

Settlemier v. Sullivan, 97 U. S. 444,

Cheely v. Clayton, 110 U. S. 701,

Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 137,

Gray v. Larrimore, 10 Fed. Cas. 1025.

In the case of Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley, 164 Fed. 963, 966, the United States Circuit Court of Appeals for the Eighth Circuit used this language:

"The basic principle of the jurisprudence of the English-speaking nations is that no person shall be deprived of his life, liberty, or property without due process of law; that is to say, without notice and an opportunity to be heard before the decision respecting the justice of the disposition of his life, liberty or property that is sought. Const. U. S. Amend. 14. In the absence of legislative power to proceed otherwise, there is but one way to make a person a party to a suit or to direct to him an adequate notice of a proceeding to deprive him of his property or to bring his person within the jurisdiction of a court, and that is to direct the notice to him by his name and to serve it upon him in person. And where the authority is granted by a statute to notify him otherwise, on certain conditions, those conditions must be fulfilled, the method prescribed must

be substantially followed, or the court fails to obtain jurisdiction of his person, and its decree against him is ineffectual and void."

The Supreme Court of Iowa, in the case of Fanning v. Krapfl, 61 Iowa, 417, used this language:

> "Notice by publication, even where there is no misnomer, does not afford a very strong natural presumption that the fact of the pendency of the action will be brought to the defendant's actual knowledge. Notice by this mode is allowable only out of necessity. It must often happen that great injustice is done and great hardship suffered. We are not disposed to open the door any wider than necessity requires. Whoever undertakes to give notice by publication, and misnames the defendant, is without excuse. It requires very little care to publish the defendant's name correctly. We are evidently justified in holding the plaintiff who gives notice by publication to a considerable degree of strictness. If we were to adopt the rule contended for by the appellee, that not only can the Christian names be entirely omitted, but the initial letters of the Christian names *transposed*, this might become the favorite mode of giving notice by publication. It appears to us that we should open the door to mischief of which no one could see the end."

It is also the law that where substituted service is relied upon and the service made is defective, the fact that the summons actually reached the defendant is immaterial.

Enewold v. Olsen, 39 Neb. 59, 64,

Miller v. Keaton, 236 Mo. 694.

In the case last cited the court said (p. 710):

"One may know that a suit is pending against him, but he is entitled to such service as the law directs before he is required to appear, and without such service the court acquires no jurisdiction of his person. Personal service cannot be had by service upon some other person and substituted service can not be had upon one by some other name than his true name."

In the case at bar, the trial court, in its memorandum disposing of the motion for new trial, used the following pertinent language, with reference to the subject of personal knowledge of the pendency of the action (R. 59):

"Whether Geilfuss actually knew personally of the pendency of the partition action is left in a very hazy state by the evidence; but if the name set forth therein by which it is now sought to bind him was not his true name or a name *idem sonans* therewith, it is immaterial whether he had such knowledge or not. Where there is no personal service and no appearance in a case with respect to a person sought to be bound, the question of jurisdiction as to such person must be determined by the record and not by so uncertain a test as his subsequent statements concerning his knowledge, or his lack of knowledge of the action."

IV.

The owner of the judgement and the person to be served, in the partition action, was Albert B. Geilfuss, Assignee.

In our statement of facts, we refer to the findings of fact relating to the recovery and docketing of the judgment against John McKinley for $2,854.02, which is the basis of the title of the Plaintiff in Error. This judgment was entered in the judgment book and appeared in the judgment roll as in favor of Albert B. Geilfuss, Assignee,

(R. 21). The name of the judgment creditor, appearing upon the docket of this judgment in the office of the Clerk of the District Court, was given as Albert Geilfuss, Assignee. The court found that at the time of the filing of the complaint in the partition action, and of the making of the findings and entering of the judgment in said action, said judgment for $2,854.02 was owned by Albert B. Geilfuss, Assignee, (R. 22), and that the execution, upon which the sale of the McKinley interest was had,, was referred to in the certificate of sale and contained a reference to the judgment roll, by way of further description of the judgment upon which the same was issued (R. 27).

Because of the fact that the middle initial "B" was omitted by the Clerk, from the name of the judgment creditor, in docketing said judgment against John McKinley, the Defendants in Error made the claim in the lower courts that the judgment became a lien in the name of Albert Geilfuss, Assignee, and that the middle initial might be disregarded in making service of summons upon Geilfuss in the partition action, and is not to be considered in determining the question of jurisdiction. The legal effect of the omission of the middle initial, in cases of service by publication, will be more particularly argued in another part of this brief. The point we make here is that the owner of this judgment was Albert B. Geilfuss, Assignee, and the action of the Clerk in entering his name upon the judgment docket as Albert Geilfuss, Assignee, does not affect the question of ownership or lien of the judgment, and that, in order to bar the lien of the judgment, it was incumbent upon the plaintiff in the partition suit to proceed against the owner thereof and against the party in whose name the judgment was entered in the judgment book and in the judgment roll. The finding of the trial court above referred to fixes the ownership of this judgment as in favor of Albert B. Geilfuss, Assignee.

The statute in force at the time this judgment was

docketed, Section 5425, General Statutes, 1894, did not require the full name of the judgment creditor to be set out in the docket and did not prescribe any particular form of docketing a judgment or make the docket of the judgment prima facie evidence of any facts therein recited. Section 5421, General Statutes, 1894, provides:

> "The judgment shall be entered in the judgment book and specify clearly the relief granted or other determination of the action."

Section 5423 provides in part:

> "Immediately after entering the judgment the clerk shall attach together and file the following papers, which constitute the judgment roll," etc.

Said Section 5425 reads as follows:

> "On filing a judgment-roll, upon a judgment requiring the payment of money, the judgment shall be docketed by the clerk of the court in which it was rendered, and in any other county, upon filing in the office of the clerk of the district court of such county a transcript of the original docket; and thereupon the judgment from the time of docketing the same, becomes a lien on all the real property of the debtor in the county, owned by him at the time of the docketing of the judgment, or afterward acquired; said judgment shall survive, and the lien thereof continue for the period of ten years, and no longer."

To constitute a judgment which may become a lien upon real property, under the aforesaid statutes, there must at least be a judgment-roll, properly made up and filed before the docketing of the judgment.

Clark v. Butts, 73 Minn. 361.

Before the decision in the Clark case, it was held in Rockwood vs. Davenport, 37 Minn. 533, that a judgment could not be docketed, so as to become a lien, prior to the entry of the judgment in the judgment book, as well as the making up and filing of the judgment-roll.

The point we are discussing was definitely passed upon in the case of Thompson v. Bickford, 19 Minn. 17, Gil. 2. It was there held that a mistake in the name of the judgment creditor, in the docket of the judgment, does not affect the lien of the judgment, the description of the same being otherwise correct, and that a judgment entered in favor of Sumner W. Farnham, though the docket showed the name of the judgment creditor to be Samuel W. Farnham, is a lien upon the real estate of the judgment debtor, the debtor's name being correctly given in the docket.

We submit that it was the judgment in favor of Albert B. Geilfuss, Assignee, which became a lien upon the real estate of John McKinley, and that the docketing of the judgment, by the clerk, with the middle initial omitted, could not and did not affect the ownership of the judgment. The judgment exists outside and independent of the docket. There was only one judgment and that was the judgment entered in the judgment book and contained in the judgment-roll, and it was this judgment which became a lien, upon being docketed. The question of the omission of the middle initial, in the published summons and elsewhere in the partition action, is clearly involved in this case, and we shall hereafter state our claims with reference to the legal effect of such omission.

The question of the effect of the omission of the middle initial in the docketing of the judgment, was not expressly passed upon by the State Supreme Court in the pending case (R. 67); but the language used clearly shows that the Court considered that Albert B. Geilfuss, Assignee, was

the party to be served. The trial Court found the facts, as to the entry and docketing of the judgment, and its conclusions necessarily imply that Albert B. Geilfuss, Assignee, the owner of the judgment, was the party to be served. The Supreme Court expressly and of necessity accepted the findings of fact as correct, as the evidence was not returned.

It is apparent that service of the summons, in the partition action, was required to be made upon Albert B. Geilfuss, Assignee, the owner of the judgment lien, and that the only response which the Defendants in Error make to this requirement is to point to the finding of service of the summons, by publication, upon Albert Guilfuss, Assignee. If we concede the regularity of the service by publication upon the party named Albert Guilfuss, Assignee, this, we submit, does not show any service whatever upon the lien holder, Albert B. Geilfuss, Assignee, required by the statute above quoted to be described in the summons, by name; and the record is left without a showing of any substituted service upon Albert B. Geilfuss, Assignee, and with a finding that he was not personally served and did not appear (R. 23).

V.

Where jurisdiction by publication is relied upon the name in the published notice should be given correctly.

This we believe to be the only safe and logical rule for courts to follow and the importance of strict adherance to this rule is emphasized in many of the cases, hereinafter cited. In cases involving jurisdiction, based upon notice by publication, it is the name, in a real sense, which is proceeded against and the rule of strict construction, applicable to substituted service, properly requires the name to be correctly given in the published notice. (Skelton vs.

Sackett, 91 Mo. 377). We think we are within the limits of accurate statement, when we say that the requirement that the name in the published notice be correctly given has been accorded universal recognization, where the question has received any extended consideration by courts of last resort, with the execption of the action of the Supreme Court of Minnesota, in the case at bar. We will take up the discussion of the visual test, applied by that Court, at a later point in this brief and after we have called attention to the treatment by certain Courts, of the sub ject of service by publication, involving cases of misnomer.

As above stated, while courts, in general, require that the name in the published notice be given correctly, many courts and possibly it would be more accurate to say most courts, having occasion to consider the subject, apply the rule that, where there has been a slight variation in the spelling of the name in the published notice from the correct spelling of the name of the person to be served and the true name and the published name, when pronounced, convey the same sound to the ear, the two names will be held to be the same. This, however, is the limit and extent to which the courts go, in permitting any deviation, in the name as contained in the published summons, from the true name. The foundation of the rule is that the names are the same because they are pronounced and sound alike, and it is upon this theory that the rule of *idem sonans* is recognized.

The trial court subjected the names Geilfuss and Guilfuss to this test (R. 39-41) and having found that these surnames are district names and are not idem sonans, the court did not deem it necessary to consider the effect of the omission of the middle initial.

In entering upon the discussion of this question, the trial court used this language (R. 39):

"The interest of Albert B. Geilfuss, Assignee, and the name in which he claimed the same, appear of record. Prima facie that was the name under which he should be sued in reference to such interest. If that were the unvarying rule, it would be very simple, easily understood and easily applied. Where one's interest does so appear of record, even though it appears under a name which is not the true name, proceedings against the owner of such interest under such name are binding upon him (citing Blinn vs. Chessman, 49 Minn. 140). This is some argument in favor of requiring those who would proceed against one having such interest of record to take steps against him in the name which there appears."

The trial court rightly held that the only cases of any real value, involving the question of *idem sonans,* in connection with the case at bar, are those where the service of the summons or other notice has been by publication only. There is a clear distinction between such cases and those in which the question arises upon personal service or appearance, where the right party is actually served or appears and the court has authority to correct the error in the name, by reason of having jurisdiction of the right party. This distinction is clearly pointed out in the case of d'Autremont vs. Anderson Iron Company, 104 Minn. 165-169. In the following cases, also, the above distinction is made:

Skelton vs. Sackett, 91 Mo. 377.

Ohlmann vs. Clarkson Sawmill Co., 222 Mo. 62.

Anderson vs. Qualey, 103 N. E. Rep. 90, (Mass. 1913).

We do not consider that a discussion of the rule of *idem sonans* is strictly applicable to the questions before

this Court, in the pending case, for the reason that the Supreme Court of the State of Minnesota followed the trial court, in holding that the names "Geilfuss" and "Guilfuss' are not *idem sonans*. The opinion of the Supreme Court, on this point, is found in the Record, at pages 69 and 70, and the discussion of the subject by the District Court is found in the Record, at pages 39 to 41, and 57 to 59. Though these concurring decisions may be considered as the law of this case, we venture to cite the court to certain cases, involving the application of the doctrine of *idem sonans*, particularly where substituted service is involved. We find this course quite necessary in view of the fact that most of the cases discussing the rule, requiring the name in the published notice to be given correctly, also consider the doctrine of *idem sonans*.

In the case of Marx vs. Hanthorn, 148 U. S. 172, this Court had occasion to consider the validity of a tax sale, in the State of Oregon, where the name of the owner was incorrectly given in the notice. Mr. Justice Shiras, speaking for the Court, in that case, used the following language:

> "This brings us to a consideration of the matters put in evidence by the defendant, going to overthrow the prima facie presumptions created by the tax deed. There were two. The land in question was admitted to belong to Ida J. Hanthorn, and that fact was found by the court below; but on the delinquent tax roll the property is alleged to belong to Ida J. Hawthorn, and it further appears by the return of the sheriff that the property was advertised and sold as the property of Ida J. Hawthorn. It was the opinion of the court below that due and reasonable notice of the sale of property for a delinquent tax is necessary for the validity of such sale, and that the fair meaning of the Oregon statutes regulating judicial sales

and sales for taxes is that the name of the owner of the lands to be sold shall appear in the notice of sale; and the court was further of the opinion that to give notice that the property of Ida J. Hawthorn was to be sold was not only not notice that the property of Ida J. Hanthorn was to be sold, but was actually misleading, and that such want of notice or misleading notice vitiated the sale." (At a later point in the opinion occurs this language): "We also concur with the court below in thinking that by no reasonable application of the rule of *idem sonans* can the name of Ida J. Hawthorn be deemed equivalent to that of Ida J. Hanthorn."

The above case was cited by Chief Justice Fuller, in delivering the opinion of the Circuit Court of Appeals for the Fourth Circuit, in the case of Meyer vs. Kuhn, 65 Fed. 705-713. This involved a partition action and service by publication and the Court held that Elizabeth Meyer is a distinct name from Sarah E. Meyers and that service by publication upon the latter did not bind the former. The entire opinion is instructive and many cases are cited. In the course of the opinion, the Chief Justice said, (p. 712):

> "When, however, constructive service by publication is substituted by statute in place of personal citation, a strict compliance with the statutory provisions is exacted. Guaranty Trust & Safe-Deposit Co., vs. Green Cove Springs & M. R. Co. 139 U. S. 137, 147, McCoy's Ex'r vs. McCoy's Devisees, 9 W. Va. 443, Hoffman vs. Shields, 4 W. Va. 490. It is essential that the publication shall correctly state the parties to the suit and their names. Detroit vs. Detroit City Ry. Co., 54 Fed. 1, 9, 16 Am. & Eng. Enc. Law, 815, and cases cited."

In the case of City of Detroit vs. Detroit City Ry. Co., 54 Fed. 1, which cited the case of Meyer vs. Kuhn, Judge

Taft, speaking for the Circuit Court, in relation to errors in the names of corporation defendants, as contained in a published notice, used the following language (p. 9):

> "One of the most important requisites of a service by publication is that it shall correctly state the parties to the suit in which the defendant is summoned, and that it shall correctly state the name of the defendant. In the case of Colton vs. Rupert, 60 Mich. 318, the suit was by Garrett B. Hunt and Henry S. Cunningham against Palmer Colton, and the defendant, a non-resident, was sought to be brought in by publication. In three of the publications the name of the first complainant was printed "Grant" instead of "Garrett," as contained in the order and in the bill of complaint. It was held by the supreme court of Michigan that the service was void. See, also Entrekin vs. Chambers, 11 Kan. 280; Magoffin vs. Mandaville, 28 Miss. 354; Chamberlain vs. Blodgett, 96 Mo. 482, Whelen vs. Wearer, 93 Mo. 430, McRee vs. Brown, 45 Tex. 503. In the present case the name of the first dedendant sued and as given in the order was the "Detroit City Railway.' As published, it was "The City Railway," which does not correctly give the corporate name of the Company intended to be sued. Again, the name of the defendant, as given in the bill of complaint, was the "Washington Trust Company of the City of New York," and the order of publication was against "The Washington Trust Company," and this was the name in the notice published. The real name of the defendant is "The Washington Trust Company of the City of New York,' and as such it is entitled to be sued. The service against it under the name of "The Washington Trust Company" cannot be regarded as valid."

The above discussion makes it apparent that an error in the name of a corporation defendant, where service is

attempted to be made by publication, is fatal. This suggets the inquiry why an error in the name of a natural person, such as the use of an incorrectly spelled surname or the omission or addition of an initial should not when substituted service is relied upon, be equally fatal.

The notice relied upon in Hubner vs. Reickhoff, 103 Iowa, 368, to confer jurisdiction of Heindrick Keisel, was directed to Heindrick Keesel. The Court quoted the statement of the rule of *idem sonans,* as contained in 16 Am. & Eng. Enc. Law 122 (1st ed.) and commented upon the unsatisfactory results to be obtained by examining lists of names, held to be *idem sonans,* or vise versa, without regard to the character of the case giving rise to the particular decision. The court then used this language (page 371):

> "This case is unlike any that we have seen. It is conceded that the name "Keisel" is pronounced by giving to the diphthong the long sound of 'i.' If that pronunciation is to obtain for the purpose of the case, the rule of *idem sonans* could not be made to apply; and, so far as can be known, it is a fact that it was so pronounced. But, if the sound of long 'e' should be permitted, ought the rule to obtain in this case? The test suggests this query: Where a service is by publication, which is made conclusive because of a presumption that it comes to the notice of the person, can the court assume as a matter of law that the name 'Keesel' would or should be understood as 'Keisel'? Can it be said to be a rule of law that one of the latter name, on seeing the former name in a notice must or should understand it to mean him? Let it be conceded that, if he were in court, the identity of the person as the one intended might be shown; but can it be assumed as a legal conclusion that 'Keesel' should be understood as 'Keisel?'"

The court held that the names "Keesel" and "Keisel" were distinct names and were not idem sonans, the "ei" in the name "Keisel" being pronounced with the long "i," which is concededly the correct pronounciation of the "ei" in the name Geilfuss, in the case at bar. Clearly there is as much, or more difference between the appearance of "Geilfuss" and "Guilfuss" as there is between "Keisel" and "Keesel."

A notice by publication addressed to A. J. Stinman was held in Steinman vs. Jessee, 108 Va. 567-572, not to bind A. J. Steinman. This case emphasizes the necessity of the correct spelling of the surname, in cases of service by publication. The court used the following language:

> "Unquestionably the doctrine of idem sonans may be invoked to cure immaterial variations in the spelling of a name, but the authorities agree that the combination of letters and syllables must produce the same sound as the true name. * * * That the initials of the christian name of the party for whom the notice is intended are correctly printed is of no importance, except as a matter of secondary consideration, since the attention of one reading the notice, per chance, may be, would not be attracted by the initials of the christian name, but by the surname far less commonly in use in the great majority of cases than the initial of a christian name."

In the case of Clary vs. O'Shea, 72 Minn. 105, involving jurisdiction by publication of the summons, the court said:

> "In our opinion it cannot be presumed that John O'Shea, named in the patent, is the same person as John O. Shea, named in the summons and proof of service thereof in that action O'Shea and Shea are not

the same name. *The person on whom the summons was to be served by constructive service was selected from all other persons in the world by the name alone and that name was Shea.*" (*Italics are ours*).

In the case of Schoenfeld vs. Bourne, 169 Michigan, 139, it was held that a published notice directed to William Dunton, did not bind William Denton.

In Grober vs. Clemens, 71 Ark. 565-568, the court held that constructive service of summons upon Minnie Grober did not bind "Wilhelmina Grober." The court said:

> "In considering this question it must be considered that no actual service was had on the defendant in that case, the decree being based on service by publication only. She had therefore no opportunity to appear and object to defects in the proceedings. In such cases the law is much more strict than in cases where the defendant has actual service of notice, though the notice be defective on account of mistake or otherwise."

In the case of Anderson vs. Qualey, 103 N. E. Rep. 90 (Mass. 1913), it was held that a person appointed as administrator of the estate of one "Eranen" could not maintain an action for the death of one "Eronen." The only difference in the surnames was that the third letter of the name was *a* in one case and *o* in the other. Under the finding of the jury, the Court held that the rule of *idem sonans* did not apply, but if it had applied "it could not have been ruled as a matter law that "Eronen" and "Eranen" are idem sonans." The Court further said (p. 92):

> "The deceased was named "Tyko Robert Eronen"; there was evidence that he was also commonly known

as "Tyko Eronen," and it was found that he was not commonly known as "Robert Eronen." Under these circumstances we are of opinion that administration granted on a petition in which the name of the deceased is alleged to have been "Robert Eranen" cannot as matter of law be held to have been granted on the estate of the deceased."

In the above case a number of Massachusetts cases are cited, bearing upon the question of the identity of names, differing in spelling, or where the difference arises through the use or omission of initials.

Robert Binford, was held not to be bound by a published summons containing the name of Robert Brimford.

Entrekin vs. Chambers 11 Kan. 280.

Jurisdiction of John S. Scarry was not obtained by a published notice addressed to John S. Carrey.

Scarry vs. Lumber Co., 233 Mo. 686.

In the case of Chamberlain vs. Blodgett, 96 Mo. 482, involving service by publication, it was held that a publication addressed to "Miller" was no publication as to "Millen." The court said (p. 483):

"Under the provisions of the statute, where proceedings are instituted against a nonresident, in order to the enforcement of a lien against his property, he must be *named* in the order of publication, R. S. Sec. 3494. If not thus named, and named correctly, the substituted service of parties is as void and valueless as if a blank had been left where the wrong name was inserted."

In the case of Miller vs. Keaton, 236 Mo. 694, it was held that "Katie A. Viger" was not bound by published notice directed to "Kitie A. Vigar." The decision was made to turn upon the point that "Katie" and "Kitie" are not *item sonans,* as there was some question as to whether the surname in the published notice was spelled with an "e" or an "a." In the course of the opinion the Court said, (p. 711):

> "Personal service cannot be had by service upon some other person, and substituted service can not be had upon one by some other than his true name. Kit and Kitty, are common substitutes for Kate and Katie; but Kitie is unusual, not given as a derivitive from Catherine and not similar in sound to Katie. It is not Katie nor is it *idem sonans* with Katie."

In the case of Milbra vs. Sloss Sheffield Steel & Iron Company, 62 So. Rep. 176 (Alab. 1913), it was held that it would not be presumed that letters of administration issued to one "Milburn" were intended for "Milbra." In the course of a lengthy opinion, the Court used the following language (p. 179):

> "Jurisdiction attaches to persons, to things, to facts, not to mere words, and an error is nothing where there is certainty as to the thing; but names are necessary to due process and to the sense and affect of those records which the Courts are bound to keep. Jurisdiction must not be usurped; it must not be taken of a matter not presented or described. Proceedings omitting the names of persons and the description of things to be dealt with would be absurd. 2 Hughes on Proc. 612, 697, 1021, 1053."

In the case of Hodgkin vs. Boswell, 63 Oregon, 589, it was held that "Hodgkin" and "Hodgkins" are names easily distinguishable and are not idem sonans.

In the case of Heberling vs. Moudy, 247 Mo. 535, it was held that service by publication against "Herberling" was not binding upon "Heberling" and that the two names are not idem sonans.

The case of Bloomer vs. Cristler, 22 Colo. App. 238, was an action to quiet title to real estate. The defendant offered in evidence, in support of his title, a certain judgment and we make a somewhat extended quotation from the opinion, as the difference in the names is presented in somewhat the same way as in the case at bar. We quote from page 240:

> "Error is predicated upon the refusal of the lower court to admit in evidence an exemplification of the record of the said county court judgment, said judgment being based upon substituted service by publication of summons. The action was begun in the county court by August Muntzing, plaintiff, against Richard Brooks et al, defendants, none of whom, unless it be Brooks, is shown to have ever been connected with the title to the property. The summons published was directed to Richard Brooks; the affidavit of publication recited Richard Brooks as one of the defendants; the order for publication of summons was directed to Richard Brooks; praecipe for default and judgment was asked against Richard Brooks, and the judgment itself was against Richard Brooks. So it appears that the entire proceedings in the county court were conducted against Richard Brooks et al., while the title to the premises appeared of record in the name of Richard Brooke, who was plaintiff's immediate grantor. The record shows that the title to this property was originally patented by the government to Mathew Harr, who afterwards with his wife executed a deed of the premises to Richard Brooke." At another point in the opinion (p. 242), the Court said:

"It seems to be well settled that where the judgment is founded upon substituted service of summons the defendant's name must be correctly given in the notice. The doctrine of *idem sonans,* however, applies to records, such as judgment, dockets, etc., but in each of the next hereinafter cited cases the appellate courts held a judgment void based upon substituted service of process wherein it appeared that the published notice failed to correctly state the name of the defendant. Troyer et al. vs. Wood, 96 Mo. 478. Chamberlain vs. Blodgett, Id., 482. Hubner vs. Reickhoff, Exec., 103 Iowa, 368. Viewing this case in the light of these authorities, Richard Brooke and Richard Brooks cannot be considered idem sonans, and, there being no evidence as to Richard Brooks, mentioned in the county court judgment, being the same person as Richard Brooke, plaintiff's immediate grantor, the court ruled properly in excluding the county court judgment and files from evidence."

For a discussion of the derivation of the name "Geilfuss" and the rules of pronouncing the same, as disainguished from the pronunciation of "Guilfuss," we refer to the memoranda of the trial court. In the memorandum, attached to the findings, (R. 40) the trial court said, with reference to the above subject:

"Geilfuss is very evidently a German name. As such it must be pronounced with the long sound of 'i.' Practically all surnames beginning with the letters 'Gei' are so pronounced. None is pronounced with the short sound of 'i.' It happens that there was a Swiss historian of German parentage named 'Geilfuss.' His name is pronounced with the long 'i.' On the other hand the name Guilfuss would necessarily be pronounced with the short sound of 'i.' The syllable

'guil' is practically always so pronounced in all kinds of words. The only exceptions are certain words imported from the French or other languages, where the original foreign pronunciation is retained, but those pronunciations are not applicable here, and if they were they would be disastrous to plaintiff's claim of idem sonans. The difference between the sound of long 'i' and short 'i' is sharp and distinct; plainly and more marked, for instance, then the difference between the 'a' and long 'e' or between short 'e' and short 'u.' We have, then the two names with distinctly different vowel sounds—'Geilfuss' with long 'i' and 'Guilfuss' with short 'i.' Are they idem sonans?"

The Court then cites certain cases (R. 41) and concludes that the names involved in the case at bar are not *idem sonans.*

In his memorandum, attached to the order denying the motion for new trial, the court used this language (R. 58):

"The affidavits therefore are insufficient on their face to warrant a new trial. But if we draw on the avilable general stock of information as to the pronunciation by English speaking people of German names containing the digraph ei we see how almost certain it is that the proof would fall short even of the affidavits. There seems to be no disposition whatever to anglicize such names so as to deprive ei of the long sound of i. In a very few cases and for special reasons the letters may take on the sound of long e. Those are palpable miscarriages. It would hardly be possible here. The combination of sounds indicated by g-e-l with hard g and long e is ill sounding and is particularly shunned in English speaking, as any examination will disclose. The German ei degenerating

into short i as claimed here is practically unknown so far as may be discovered by research. We have only to refer to names with which we are all familiar, some local and some not, to discover how very general the disposition is among English speaking people to perpetuate the German sound of ei, giving it long i wherever found in German names. Some of those names exemplifying this rule, are as follows: Geiler, Geissler, Hein, Heim, Leiter, Klein, Keizer, Kalheim, Leibel, Leibnitz, Weiss, Weitzel, Reinhart, Reichart, Stein, Rhein, Meistersinger, Mannheim, Mannheimer, Holstein, Heinrich, Heinze, Freiburg, Fleischer, Fleischmann, Eichman, Geist, Blenheim, Breittman."

For a further instructive discussion of the formation and pronunciation of the name Geilfuss, see the opinion of the State Supreme Court (R. 70).

VI.

Effect of the Absence of the Middle Initial.

As we have pointed out, the trial court did not consider the omission of the middle intial, as an independent proposition, but based its decision upon the ground that the surnames Geilfuss and Guilfuss were different and distinct names and not within the rule of idem sonans and hence that the service was void. It, therefore, became unnecessary for that court to enter upon an examination of the effect of the absence of the middle initial from the name Albert Guilfuss, Assignee, as published. Likewise the State Supreme Court did not consider the question of the absence of the middle initial, as an independant proposition, but may have taken it into consideration in the comparison of the full true name and the full published name.

If this court reaches this point, in the consideration of the case, without arriving at a decision upon other grounds, we venture the opinion that the absence of the middle initial would then become a material consideration, upon the theory, upon the one hand, that the absence of the middle initial from the name in the published summons, in and of itself raises a question of identity, which unless overcome, by some proper evidence or finding, as presented by the record, is fatal to the presumption of identity and upon the other hand, the absence of the middle initial from the name in the case at bar, taken in connection with the difference in the true surname and the surname published, is more persuasive of lack of identity.

It may be profitable to refer to some of the cases, in different jurisdictions, bearing upon the effect of the omission of the middle name or initial, particularly in cases of substituted service of process. We confess that our search for decisions of the Federal Courts have not been rewarded with the discovery of seemingly controlling cases bearing on this particular point.

The decisions of the Supreme Court of the State of Minnesota on this subject have, in some instances, shown a quite advanced position and a disposition to break away from the general rule of the common law that a middle initial is immaterial and no part of the name.

In the case of d'Autremont vs. Anderson Iron Co., 104 Minn., 165, a partition action, hertofore referred to, it was held that a judgment creditor named George W. Leslie was not affected by service, by publication, upon George H. Leslie, the sole difference in the two names being the difference in the middle initial, but in that case the Court reserved the question, which was not involved, of the effect of the entire omission of a middle initial, where one exists in the name of the party sought to be bound (p. 170). The case presents an interesting discus-

sion of the subject and contains an extensive citation of authorities. On page 167 the court used this language:

> "As a general rule, the common law recognizes but one christian name and failure in judicial or other proceedings in giving the name of the party to state his middle name or initial thereof, as commonly used, is not fatal to their validity. But the rule, like most rules of judical procedure, is not without exceptions." (Citing Stewart vs. Colter, 31 Minn. 385, State vs. Higgins, 60 Minn. 1).

The court then makes reference to the history of the origin and use of names of individuals. For a further discussion of the history of such names, see Petition of Snook, 2 Hilt. (N. Y.) 466; Loser vs. Plainfield Savings Bank, 149 Ia. 672. Note to Proctor vs. Nance, 132 Am. St. Rep. 563.

A much more serious question of identity is involved in the case at bar, than in the case of Ambs vs. Chicago, etc. Ry. Co. 44 Minn. 266, where it was held that a title vested in William *H*. Brown could not be divested by proof of a conveyance from William *B*. Brown. That was a question of voluntary conveyance where the rule of identity is seldom enforced as strictly, as in cases pertaining to jurisdiction. In the case above cited the court said (page 270):

> "But while, under many circumstances, it has been held that a middle initial in the name of a person will not be deemed a material part of his name, it is a matter of common knowledge that very many and perhaps at this day most persons bear a double or more than one christian name and that in the writing of the name one of these is very commonly indicated merely by its initial letter. The use of such initials, in addition to a

fully written Christian name, is the most common means by which, in all the affairs of life, persons bearing names otherwise the same are distinguished. In judicial proceedings involving and determining questions of title, this should not be ignored. * * * In view of the facility with which the title or the rights of any person appearing upon the public records may be apparently transferred and divested by a deed or other instrument executed by any person bearing the same name, the question of identity of person becomes one of the highest importance when title is in issue and to be adjudicated; and when at least any circumstance appears casting a reasonable doubt upon the identity of persons upon whose identity the title depends, we think that identity is not to be presumed merely from the identity of names. Or, to be more precise in our decision, we hold that in the trial of an issue of title to real estate, where different initial letters are used in the names of persons which are otherwise identical and upon the identity of which persons the title depends, the party upon whom the burden of proof rests must present some other proof of identity; that, with such a distinguishing feature in the two names, a presumption that the persons are the same, does not arise merely from a similarity of the two names."

It must be apparent that much greater weight should be given to any circumstance giving rise to a doubt as to identity, such as omission of the middle initial, in cases where jurisdiction is sought to be sustained by substituted service, than in cases involving a doubt as to identity in cases of conveyances, which are required to be witnessed and acknowledged and where the actual identity of the individual is ordinarily not difficult to determine. The problem presented with respect to jurisdiction by publica-

tion, involving identity of persons served, especially where the question arises on collateral attack must, in the nature of things, be very serious for the reason that the record is conclusive as to what appears and cannot be aided by extrinsic evidence. In the case at bar the question of doubt as to identity appears in the findings of the court, and there is no finding which overcomes this doubt and we cannot conceive of any finding, short of personal service or appearance after publication and before judgment which could be relied upon to cure the defect.

The d'Autremont case was cited in the cas eof Northern Commercial Company vs. Hartke, 110 Minn. 338, which case did not involve the acquiring of jurisdiction by publication, and, in connection with the cast cited, the court used this language:

> "At one time it was quite universally held that a middle initial formed no part of a person's name and that any disrepancy in that respect would be disregarded. But this rule has been greatly modified by recent decisions and now it is the rule that where the wrong middle initial is used in a process the object of which is to acquire jurisdiction over the person whose name is incorrectly given, the error, particularly in the case of substituted service, is fatal."

After the decision of the case of Northern Commercial Co. vs. Hartke, the case at bar was decided and is reported in 118 Minn. 117, and as noted, the absence of the middle initial was not treated as an independent proposition.

The latest utterance of the Minnesota Supreme Court on this subject is contained in the case of Willard vs. Marr, 121 Minn. 23. That was an action to set aside a certain judgment, entered upon default, where the plaintiff was

served personally as David E. Willard, but his correct name was David Willard. The case involved the effect of the insertion of a middle initial in a name, where none properly existed. The court disposed of the case by upholding the validity of the service, upon the ground that the defendant had been served personally and thus brought into court, and had full notice and opportunity to defend. After stating this rule and citing authorities, the Court added this significant language: "The rule is different where the service is by publication." Thus indicating that if the case had been one where the service relied upon was by publication, the service would have been held void, on account of the addition of the initial.

In the late case of Newby vs. Edwards, 153 N. Car. 110, the court said, (p. 112):

> "It is true that in certain cases the initial of the second christian name is unimportant, but this is only in such cases where the identity is certain. If there is any question as to the identity of the person, the initial or middle name becomes very important."

In another recent case, First National Bank vs. Hacoda Mercantile Company, 169 Alab. 476, the court held that a mortgage given by W. H. McDonald and recorded , was not a notice of a mortgage given by W. N. McDonald. The court discussed the use of middle initials. It was insisted that the middle initial used was no part of the name and hence immaterial. With reference to that suggestion the court said, in part (p. 479):

> "There are but twenty-six letters in our alphabet and one of these must constitute the initial of every name in the land. The same letter is the initial of a vast number of different names; hence it can be easily seen that, where a party signs his christian name by

initials only, each initial should be correctly written. The common law rule of but one Christian name and one surname and that a wrong middle initial or name is immaterial (if the rule applies to initials,) will certainly not answer the modern requirements of business with reference to recorded conveyances being notice to the world of the conveyancer and the property conveyed."

In the case of Carney vs. Bingham, 51 Wash. 452, which involved the use of a wrong initial, in giving notice in tax foreclosure proceedings, the court used this language:

> "Nor can the foreclosure proceedings be upheld on the theory that the middle initial is no part of a person's name and hence no part of the name inscribed upon the assessment roll or in the certificate of delinquency. At common law it is true a legal name consisted of one given name and one surname, or family name, and mistakes in a middle initial or middle name were not regarded as of consequence. But since the use of an initial instead of a given name before the surname has become a common practice, the necessity that these initials be all given and correctly given in court proceedings has become of importance in every case and in many absolutely essential to correct designation of the person intended."

The case of Loser vs. Plainfield Savings Bank, 149 Iowa 672, contains a discussion of the modern rule, respecting the materiality of the middle name or initial; and under a statute requiring the names of the mortgagors to be in indexed, a mortgage appearing under the name J. W. McGregor, was held not to relieve a purchased from making further investigation with respect to the title to lands standing in the name of William McGregor. The opinion

contains an instructive discussion of the necessity, in present day transactions, of the use of the middle name or initial for purposes of identification and points out the prevailing tendency of the courts to modify the old common law rule, which disregards the middle name or initial. The court shows that the reason for the old rule no longer exists.

In Wicker vs. Junkins, 49 Tex. App. 366, the court said (p. 368):

> "There is a familiar rule of the common law which disregards the middle initial, or middle name, of a party to an instrument, and looks alone to the first initial, or the first christian name, for identification. This grew out of the former custom of having only one christian name. Since the use of more than one christian name has become almost a universal custom among the English-speaking race, the rule has lost much of the reason upon which it was originally based."

In a number of states it has been held that the middle name or initial is a material part of the name of the person.

Bowen vs. Mulford, 10 N. J. L. 230.

Parker vs. Parker, 146 Mass. 320.

Commonwealth vs. Buckley, 145 Mass. 181.

Dutton vs. Simmons, 65 Me. 583.

Ming vs. Gwatkin, 6 Rand. (Va.) 551.

In the case of Bowen vs. Mulford, supra, the court used this language:

"The introduction of a letter or name between the christian and surname is very common, for the purpose of distinction; and in the use and understanding of the people at large, and therefore in presumption of fact, John Mulford and John S. Mulford, are not the same but different persons."

In Wisconsin it has been held that the docket entry of a judgment against Edward Davis was not constructive notice of a lien on the real estate of Edward A. Davis.

Davis vs. Steeps, 87 Wis. 472.

A judgment against Daniel Murphy, held not to be a lien upon the land of Daniel J. Murphy.

Crouse vs. Murphy, 140 Pa. St. 335.

In the recent case of Gibson vs. Foster, 135 Pac. Rep. 121, (Colo. App. 1913), it was held that the title of the plaintiff "A. S. Deleplane" was not affected by a judgment based upon publication of the summons against a defendant described as A. L. Deleplane. The court holds that the difference in the initial is fatal, also that the two names are not within the rule of *idem sonans*, and the necessity, in modern times, of the use of the middle initial as " a distinguishing identificaton of the person," is adverted to.

We submit that just as great a doubt, as to identity, is raised by the omission of a middle initial, where the middle initial rightfully belongs in a name or by the insertion of a middle initial, where none rightfully exists, as by using a middle initial different from the correct one. We cannot conceive how there is any more reason, in the nature of things, and in view of well known modern conditions, in disregarding, in the one case, the strict rule of

the common law, upon the ground that the reason upon which it was based has ceased to exist and applying, in the other case, the common law rule, in all its strictness. If this is not so the anomalous situation is presented that if one desires to obtain jurisdiction of a non-resident lien holder and such non-resident has his title or lien of record in a particular name, containing a middle initial, jurisdiction of such party can be obtained by publication of a summons directed to him, with the middle initial omitted, though in the community in which he lives, that may be the distinguishing mark which differentiates him from other parties having the same christian name and the same surname, but the rule would remain that jurisdiction of such non-resident could not be obtained by publishing a summons directed to him, containing a middle initial different from that shown by the record.

In view of the foregoing citation and discussion, we suggest that the absence of the middle initial from the name Albert Guilfuss, Assignee, as published, especially taken in connection with the difference in the surnames, Geilfuss and Guilfuss, does not permit of the presumption being indulged in that the name described in the published summons was the same as the name of the judgment creditor, Albert B. Geilfuss, Assignee. This being so, there was no notice to the judgment creditor and the court, assuming to dispose of his judgment lien, in the partition action, was without jurisdiction in so acting.

VII.

The motion of the defendants in error for a new trial in the District Court.

After the trial court had filed its findings and before the entry of judgment, the Defendants in Error, plaintiffs in the trial court, made a motion for a new trial (R. 43-

59). The order overruling this motion was assigned as error, by the Defendants in Error, as appellants in the State Supreme Court, (R. 67). The assignment of error on this point is number 6 and is as follows:

> "In overruling the motion of the plaintiffs for a new trial, for the reason that the facts found by the court, do not justify the decision of the Court thereon or the judgment ordered by the Court."

The Defendants in Error presented no argument, either orally or in their brief, in the State Supreme Court, in support of this assignment of error, and did not claim any relief, (otherwise than by the statement of the assignment of error quoted,) because of the denial of their motion for a new trial. This situation is not, of course, shown by the record returned to this Court. The opinion of the State Supreme Court gave no consideration whatever to this motion for a new trial, or to the affidavits accompanying the same.

Under these circumstances, we would probably be justified in passing this motion without any attention, except for the fact that the same is contained in the printed record and it may be desirable to call the attention of the Court to the true situation. It may be proper to say that the Plaintiff in Error, in designating the parts of the record to be printed, pursuant to the Rules of this Court, excluded the motion for new trial and all proceedings connected therewith, but the Defendants in Error filed a request that the same be printed, together with certain other parts of the record, omitted by the Plaintiff in Error, in his designation.

The motion for new trial was based upon the grounds of surprise, newly discovered evidence, that the decision was not justified by the evidence and that the conclusions

of law of the court were not supported by the findings of fact (R. 44). There was no settled case or bill of exceptions and the motion was not made upon the minutes of the court.

It will be observed that the grounds of surprise, newly discovered evidence and that the decision was not justified by the evidence were not, nor were any of them assigned as error in the State Supreme Court.

Under the decisions of the Supreme Court of Minnesota a new trial can not be granted upon the ground that the conclusions of law are not supported by the findings of fact.

Lumbermen's Insurance Co. vs. City of St. Paul, 82 Minn. 497.

Farnham vs. Thompson, 34 Minn. 330.

Moreover, the denial of a new trial, upon the grounds of surprise and newly discovered evidence, is a matter of discretion of the trial court and will not be reversed, on appeal, except for an abuse of discretion.

State vs. Lautenschlager, 23 Minn. 290.

Hull vs. Minneapolis Street Railway Co., 64 Minn. 402.

Wester vs. Hedberg, 68 Minn. 434.

Otterness vs. Botten, 80 Minn. 430.

Wingen vs. May, 92 Minn. 255.

Bunker vs. United Order of Foresters, 97 Minn. 361.

Slocum vs. McLaren, 109 Minn. 49.

It goes without saying, that the learned counsel for the appellants, in the State Court, appreciated the force of these decisions and refrained from pressing any claim as to error, in overruling their motion for a new trial.

The apparent purpose of the motion for a new trial was an attempt to make a showing that the name "Geilfuss" was susceptible of a different pronunciation from that found by the trial court, and that he knew of the publication, but the affidavits presented by Geilfuss and others, in support of the motion for new trial, sustain the contention of the Plaintiff in Error and the views of the trial court, as expressed in his memorandum attached to the findings, that the surname Geilfuss is properly pronounced with the hard "g" and the long sound of "i." Geilfuss himself and his son state that this is the correct pronunciation and the way the name is pronounced by those who know them, but that certain persons before becoming acquainted with them sometimes spell the name as though it were pronounced with the short sound of "i" and sometimes pronounce it in the same way.

Moreover, we contend that where the record of a judgment is relied upon in support of a title, and the method of obtaining jurisdiction over the parties is set forth in such record, the proof contained in the record is conclusive and cannot be varied or supplemented, either to support the judgment or to impeach it. This must certainly be the rule when the jurisdiction is dependent upon substituted service of process. It cannot be the rule that a judgment is void today and valid tomorrow, because certain evidence is supplied on the latter date, outside the record, tending to show that the proof of service of the summons may have been different from that contained in the record or that certain persons in a distant part of the country pronounce the defendant's name in a particular way. In the case at bar the judgment roll, in the partition case, setting forth

the proof of service, was conclusive upon everybody as to the character of the service and as to whether the service was valid or invalid and those who were not bound by the judgment, as entered, cannot be thereafter bound thereby by virtue of proof or affidavits made, as in the present instance, by Geilfuss and others, showing or tending to show that the name was sometimes pronounced with the short "i" and thus present a basis for arguing that the name, as published, was *idem sonans* with the true name. It will be observed, too, that the affidavits of both Geilfuss and Timlin, presented by the plaintiffs on the motion for new trial, were made more than nine years after these parties, "for a valuable consideration," had assigned their judgment against John McKinley, and were offered to impeach the title of those claiming under their assignee.

We have heretofore referred to some of the authorities' bearing upon the proposition that proof of service by publication can only be made in the manner provided by the statute and that if such stautory proof is insufficient jurisdiction is not obtained. By inference and conjecture the attempt was made to show, by the affidavits, that the summons was received through the mail by Geilfuss, but this kind of proof is not permissible under the statute. In addition to the cases cited, in another part of this brief, as bearing upon the necessity of strict construction of the statutes, with reference to the conditions and proof of publication and as showing that the proof of service contained in the record is conclusive, we cite the following:

Dick vs. Foraker, 155 U. S. 404.

Wilcher vs. Robertson, 78 Va. 602, 616.

Hahn vs. Kelly, 34 Cal. 391.

On the point that the summons, addressed to the wrong name, may actually have come to the attention of the party

intended to be served, is immaterial, see memo. of trial Court (R. 59).

Enewold vs. Olsen, 39 Neb. 59, (*supra*).

Miller vs. Keaton, 236 Mo. 694, (*supra*).

VIII.

Not only was the rule adopted by the Supreme Court of Minnesota, in this case, unsound in principle, but the same was misapplied.

The cases cited in the foregoing subdivisions, drawn from a large number of jurisdictions and covering a great variety of circumstances, warrant the conclusion, we believe, that in order to acquire jurisdiction by publication, the name published must be the correct name of the individual, or party to be served, and that the rule of idem sonans is recognized in the instances, where it has been applied, not strictly as an exception to the general rule, but upon the theory that the true name and the name used are the same, because of identity of sound. The historical basis of the rule of idem sonans appears to have been the endeavor to adopt a method to avoid complications growing out of inaccuracy in the spelling of proper names, undoubtedly more prevalent in former than in more recent times. We venture to say, however, that an examination of the authorites cited, and others, shows that there is no disposition on the part of the courts to enlarge the applicaion of the rule of idem sonans, in cases depending upon jurisdiction by publication or other modes of substituted service. There appears to be no general disposition, where jurisdiction is involved, to arbitrarily say that two names which are spelled differently are to be treated

as the same, unless the rule of idem sonans can properly be applied. The rule requiring literal accuracy in the spelling of the name of a non-resident defendant, in a published notice, is, of course, the safe rule and easily applied. In a measure, the application of the doctrine of idem sonans, as defined and limited by the courts, is reasonably certain; it at least supplies a defined measure and test. But we maintain, with all due respect, that the rule adopted and applied by the Supreme Court of the State of Minnesota, in the case at bar, holding that names, which are essentially different and distinct, in that the surnames are spelled differently, and the middle initial is present in one and absent in the other, look alike in print and are the same, involves the application of an arbitrary and uncertain test. To hold that jurisdiction may be obtained over a defendant, where a name different from his true name, is inserted in a published notice is contrary to the principles of due process of law, requiring notice, and leads to a result which the Federal and other Constitutions have sought to avoid. The rule is further subject to the criticism that if it is left open for the courts, to say that names, which are spelled differently in a published notice from the true names, may be held to be the same, though not even limited by the doctrine of *idem sonans,* then there is no way of determining, in cases of that kind, whether jurisdiction exists or does not exist, until the question has been passed upon judicially, in the particular instance. In such circumstances and in the absence of fixed rules, the views of different judges might be expected to be diverse. This presents a species of government by men, instead of by law, contrary to the entire frame work of English and American jurisprudence.

The fact that the rule of idem sonans should not, under all circumstances, be applied to names which sound the same, but manifestly are different, is no argument why another and arbitrary exception should be adopted to the

general rule requiring accuracy in names in a published notice, but is rather an argument in favor of the application of the general rule, in all cases, and, at least, in those cases where it is apparent that the application of the rule of idem sonans is not proper. This is in response to the suggestion, contained in the opinion of the Supreme Court of Minnesota, that the rule of idem sonans cannot be made to apply to certain names, of different spelling, but which sound alike when pronounced, such as "Olson" and "Olsen," "Reid" and "Reade," "Taylor" and "Tailer," (R. 70). The Court seems to have failed to distinguish the general rule, requiring accuracy in the spelling of names in a published notice, from the exception to the rule, if we may so call it, which permits the application of the doctrine of idem sonans, in certain cases. This is made apparent by the following language of the Court (R. 70):

> "Where the summons is served by publication, the true test should not be whether the names are strictly idem sonans—sound the same to the ear when pronounced—but whether they look substantially the same in print."

In none of the cases which we have cited, and we think it is safe to say in none of the cases in the books, is the rule of idem sonans applied as the primary test of identity, when jurisdiction depends upon publication, requiring literal accuracy in the spelling of the published name.

We submit that names spelled differently are not the same and that a name published without the middle initial is not the same as the real name, which contains such initial, and upon reason and authority, there is no room for speculation, in cases of service by publication, as to whether such names "look substantially the same in print." Such a doctrine invites the consequences of the

absence of definite rules, as a basis of titles to property and substitutes therefor the uncertain and variable tests of human judgment. In redeeming from the execution sale, the grantor of the Plaintiff in Error, a subsequent judgment creditor, was required to act upon what he was advised was the legal effect of the judgment in the partition action, and of the service of summons, therein set forth, in so far as the McKinley interest in the lands involved in that case was concerned. He had no opportunity, before he was compelled to elect to redeem, and so save the lien of his subsequent judgment, or suffer the loss thereof, to get the opinion of a court of last resort, or of any court, as to the effect of the partition proceedings upon the lien of the Geilfuss judgment. He necessarily acted upon the general rule that Albert B. Geilfuss, Assignee, was not served, because he was not named as a defendant, and there was no personal service upon him or appearance by him or in his behalf and that the name Albert Guilfuss, Assignee, appearing in the list of defendants, did not, when pronounced, sound the same as the name of the judgment creditor Albert B. Geilfuss, Assignee. Years after this redemption was made and the title acquired by such redemption became vested, the present action was brought and the trial court held, in effect, that the redemptioner acted upon correct advice and information, but, upon appeal, the Supreme Court, while conceding that the names were different and that the rule of idem sonans did not apply and that this rule is the test ordinarily invoked, in cases where the names are different, arrived at the conclusion, by applying to the facts of this case, the novel test that these names, though actually different, "look substantially the same in print," and hence that the lien of the judgment from which the grantor of Plaintiff in Error redeemed was cut off by the proceedings in the partition action and the title based thereon was declared void. This recital, it occurs to us, illustrates the mischief and uncer-

tainties which due process, as applied to titles to real estate, is intended to avoid and the speculative theory acted upon by the Minnesota Supreme Court invites experiments, in like cases, before different courts, to get the views of different judges, as to whether certain names look sufficiently alike or vice versa, either to sustain or to defeat jurisdiction. It can not be that one's right to notice and hearing, under the due process of law provisions of the Fourteenth Amendment, before he can be deprived of his property, is to be determined, in cases of this character, by such uncertain standards, as those suggested by the opinion of the Supreme Court of Minnesota.

It would seem to be futile to attempt to demonstrate, by argument, that the names "Albert B. Geilfuss, Assignee," and "Albert Guilfuss, Assignee," taken as a whole, are different and distinct names. An inspection of the two names would appear sufficient to establish that the names are different and distinct. The arrangement of the letters of the English language make them different, and both of the lower courts have held that these names are not *idem sonans*. To say that the use of the latter name in place of the former is not misleading, is to beg the question and simply apply another arbitrary test. To say that the party to be served or those knowing him would not be mislead by the use of the erroneous name, and hence that the use of such erroneous name is not fatal to jurisdiction, by publication, is to indulge in conjecture, where certainty and fixed rules are required, and to disregard the settled law of this Court and of the Courts of the States, that a judgment based upon a service by publication is to be tested by what is shown by the record and the record and all proceedings connected with the substituted service, including the statutory authority, are to be strictly construed.

Because of the difference between the name published and the true name, the legal presumption of identity of

persons, arising from identity of names, did not become operative, in the partition case, and, under the circumstances, we contend that the service by publication "was as void and valueless as if a blank had been left where the wrong name was inserted." (Chamberlain vs. Blodgett, 96 Mo. 482). A service by publication is upheld only upon the theory that identity of names raises a presumption of identity of persons, and that a published summons reaches the defendant is a presumption of the law only, and at best such service "does not afford a very strong natural presumption that the fact of the pendency of the action will be brought to the defendant's actual knowledge" (Fanning vs. Krapfl, 61 Iowa 417), and as the Court said in that case, speaking of the practical necessity of such form of service, and of its indisposition "to open the door any wider than necessity requires:"

> "Whoever undertakes to give notice by publication and misnames the defendant is without excuse. It requires very little care to publish the defendant's name correctly."

An instructive case, in connection with the consideration of two names, taken as a whole, involving service by publication, is that of Thornily vs. Prentice, 121 Iowa 89. It was held that Willis H. Thornily was not bound by a published notice addressed to W. M. Thornily. In this case the court used the following language (p. 94):

> "A judgment rendered upon such service will bind no one not properly named in the record. This does not mean that the name must be correctly spelled, but it must be so nearly correct as to come within the rule of *idem sonans*. That is, if the name as spelled or written in the record, when pronounced according to commonly accepted methods, conveys to the ear a

sound practically identical with the sound of the correct name as commonly pronounced, the designation is sufficient and no advantage can be taken of the clerical error. 21 Am. Eng. Enc. (2nd ed.) 313. Where, however, the record of a judgment entered upon a notice of this kind presents not a mere discrepancy or variation in the spelling of a defendant's name, but the use of a name other and different than that borne by the person against whom such judgment is sought to be enforced, the rule of idem sonans is not applicable and the adjudication is of no validity against such person." (Continuing the Court said): "That Willis H. is not identical in sound or in fact with William M. or Wm. M. hardly requires argument or illustration, but a few instances in which the rule has been applied may not be out of place. "Helen" and "Ellen" are distinct names. Thomas vs. Desney, 57 Iowa, 61. So, also, "Furman" and "Freeman" (Howe vs. Thayer, 49 Iowa, 154); "Henry" and "Harry" (Garrison vs. People, 21 Ill. 535); "May" and "Mary" (Kennedy vs. Merriam, 70 Ill. 228); "McCarver" and "McCravey" (McCravey vs. Cox, 24 Ark. 574); "Griffin" and "Griffith" (Henderson vs. Cargill, 31 Miss. 367); "Matthew" and "Mather" (Robson vs. Thomas, 55 Mo. 581). Nor is this a mere technicality. When the rights of a person are to be concluded by a notice which is merely constructive, not actual, it is right and just that the party who wishes to avail himself of its benefits be held to follow the forms provided by statute."

The above is a well considered case and the language of the court, here quoted, is applicable to the case at bar, and applying the rule of decision followed in the Iowa case, Albert Guilfuss, Assignee, "is not identical in sound or in fact with" Albert B. Geilfuss, Assignee, and if this is so, it follows that service by publication upon Albert Guil-

fuss, Assignee was no service upon or notice to Albert B. Geilfuss, Assignee.

It is respectfully submitted that the judgment of the Supreme Court of the State of Minnesota, under review, should be reversed and the case remanded to that Court, with instructions to affirm the judgment of the District Court of St. Louis County, Minnesota, in favor of the Plaintiff in Error.

FREDERIC D. McKENNEY,
HENRY J. GRANNIS,
Attorneys for Plaintiff in Error.

FILED
APR 23 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 325.

HENRY J. GRANNIS, PLAINTIFF IN ERROR,

vs.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, ET AL.

No. 326.

HENRY J. GRANNIS, PLAINTIFF IN ERROR,

vs.

ROBERT B. WHITESIDE, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

FREDERIC D. MCKENNEY,
HENRY J. GRANNIS,
Attorneys for the Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No 325.

HENRY J. GRANNIS, PLAINTIFF IN ERROR,

vs.

ALBERT L. ORDEAN, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, ET AL.

No. 326.

HENRY J. GRANNIS, PLAINTIFF IN ERROR,

vs.

ROBERT B. WHITESIDE, MARGARET SULLIVAN, ALFRED JAQUES, THEODORE T. HUDSON, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Referring to the jurisdictional argument found in the brief of the defendants in error, pages 6 to 9, inclusive, we suggest that counsel misinterpret the decisions of this court in advancing the proposition

that the decision of the State Supreme Court in the case at bar to the effect that jurisdiction was obtained of Albert B. Geilfuss, assignee, pursuant to the service contained in the record, is binding upon this court, and we submit that the decisions of this court cited on page 9 of the brief of the defendants in error do not sustain that proposition. On the contrary, we maintain that, where the question of lack of notice or insufficiency of notice is asserted, under the provisions of the Fourteenth Amendment to the Constitution of the United States, this court will decide for itself whether the record shows that any notice has been given or such notice as complies with the due process of law provisions of the amendment. (See cases cited in our original brief, pages 23 to 25, inclusive).

Counsel cite in support of their proposition the case of Ballard *vs.* Hunter, 204 U. S., 241, and quote from the opinion in that case. The title there involved was based upon proceedings for the collection of levee taxes. One of the contentions of the plaintiff in error was that the statutory requirements for service by publication did not comply with the Fourteenth Amendment. This question was examined by this court, and the provisions of the statute were held to provide for a notice consistent with due process of law. The further point was made that the plaintiff in error had not been given the notice required by the statutes of the State. Referring to this, Mr. Justice McKenna, speaking for the court, said (p. 260):

> "This assignment of error is elaborately argued by counsel, but the distinction is not clearly made between the construction of the statutes and their effect as construed. What the statute required was for the Supreme Court to determine; whether, as determined, it constituted due process is for us to decide."

It seems to us, therefore, that this quotation in itself completely answers the contention of counsel for the defendants in error. It is manifest that the quotation contained in their brief is modified by the language here quoted. The opinion shows, in the language quoted and elsewhere, that if the action taken, professedly under the provisions of statutes authorizing substituted service, in a given case, is claimed not to have resulted in such service as to comply with due process of law this court will decide that question independently of the decision of the State court.

The case of Castillo *vs.* McConnico, 168 U. S., 674, also involved a notice given in tax proceedings. The writ of error appears to have been dismissed upon two grounds, first, that the Federal question was not raised in the lower courts and, second, that the decision of the Supreme Court of the State did not involve a Federal question. The views of this court, expressed in various decisions, relative to the application of the due process of law provisions of the Fourteenth Amendment to the revenue and tax statutes and proceedings of the States was

adhered to, and the notice provided for by the statutes of the State of Louisiana was held not to be in violation of the due process of law provisions of the amendment, even though the statutes were to be construed as not requiring the name of the owner to appear in the notice. Immediately following the quotation from the opinion, delivered by the present Chief Justice, found on page 9 of the brief of the defendants in error, is this language (p. 680):

> "Conceding that a sale to enforce taxes made without notice, actual or constructive, would be a want of due process of law, it is yet obvious that the publication for thirty days required by the State law was sufficient notice to constitute due process of law, and that the mere fact that there was affixed to the name inserted in the advertisement the words, 'or her estate and heirs,' did not destroy the efficacy of the advertisement, and did not cause it to be, in legal contemplation, no notice whatever."

At another point in the opinion the court used language which clearly distinguishes State-tax proceedings from other cases arising under the Fourteenth Amendment (p. 683):

> "The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment and matters which may or may not be essential under the terms of a State assessing or taxing law. The two are neither

> correlative nor coterminous. The first, due process of law, must be found in the State statute, and cannot be departed from without violating the Constitution of the United States; the other depends on the lawmaking power of the State, and, as it is solely the result of such authority, may vary or change as the legislative will of the State sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the State statute, is a State question within the final jurisdiction of courts of last resort of the several States. Whn, then, a State court decides that a particular formality was or was not essential under the State statute, such decision presents no Federal question, providing always, the statute, as thus construed, does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the State interpretation of its own law is controlling and decisive." (Citing cases.)

The cases of Baltimore Traction Co. *vs.* Baltimore Belt R. R. Co., 151 U. S., 137; French *vs.* Taylor, 199 U. S., 274, and Palmer *vs.* McMahon, 133 U. S., 660, also cited by defendants in error, were all tax cases in which the notice and procedure provided for by the State statutes were held not to be in conflict with the due process of law provisions of the Fourteenth Amendment.

In the case last cited Chief Justice Fuller, delivering the opinion of the court, said (p. 669):

> "The power to tax belongs, exclusively, to the legislative branch of the Government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law (citing cases). The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value; and opportunity to be heard should be and is given under all just systems of taxation according to value. It is enough, however, if the law provides for a board of revision, authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made."

It is apparent that these tax cases, cited in the brief of the defendants in error, do not control the jurisdictional question involved in the case at bar. The necessity of service upon Albert B. Geilfuss, assignee, the owner of the judgment lien, and the authority of this court to determine for itself whether service conformable to the due process of law provisions of the Fourteenth Amendment was made, rest upon other grounds and decisions. As we pointed out in our original brief (p. 21), the Supreme Court of the State of Minnesota held that

the lien of the Geilfuss judgment could not be cut off without proper service of summons upon him. See also decisions of this court cited on pages 21 and 22 of our original brief.

On page 14 of the brief of the defendants in error the case of Lane *vs.* Innes, 43 Minn., 137, is cited as upholding the decision of the State Supreme Court. We submit that this case is not entitled to the importance attached to it by counsel as a State authority, and in no event is it controlling upon this court. There were a number of important legal propositions involved in the decision of the case of Lane *vs.* Innes. The name of the party to be served was Beulah M. Plimpton. The name as printed in the published summons was Berlah M. Plimpton. The question so presented is considered on page 13 of the opinion of the court, and no extended discussion of it is indulged in, the court merely saying:

> "In the published summons in that action there was a clerical mistake in the spelling of the plaintiff's name, caused by the change of a single letter. Her name was then Beulah M. Plimpton, as printed it read Berlah M. Plimpton. In the judgment of the trial court this was not deemed so material a change as to be misleading. And we think this will be sufficiently apparent when the two names are placed in juxtaposition. The plaintiff, or any one knowing her could hardly mistake as to the person intended." (Citing cases.)

As above remarked, there were many legal propositions discussed in that case, and some of these questions were gone into at length, both by the Supreme Court of Minnesota and by the trial court, as shown by the memorandum of the trial court, appearing in the Paper Book, being the printed return from the trial court filed in the Supreme Court, pages 21 to 28, and it is apparent from the quotation from the opinion of the Supreme Court above made that the writer of the opinion, so far as this question of name was concerned, intended to follow the decision and reasoning of the trial court. By referring to page 25 of the Paper Book in that case we find that the trial judge, in his memorandum, used this language with reference to this particular point:

> "We have compared the summons, the filing of the same, the affidavit for the publication, the copy of the summons published and the affidavit of publication of the same as they appear in the judgment roll, with the statute and find a substantial compliance with the same. The misspelling of the defendant's name, as appears in the printed copy of the summons and perhaps in some of the other papers, so that it reads Berlah instead of Beulah M. Plimpton, is not in our opinion a jurisdictional defect; that it comes within the rule of *idem sonans*. It could hardly be possible that any one could be mistaken as to the person intended. Unlike the Landis case the words sound very much alike and the middle letter of the name was correct while in the Landis case it was different."

It thus appears that the trial court placed its decision squarely upon the ground that the two names were *idem sonans,* and the Supreme Court in the limited discussion which it gave to this question was apparently following the decision of the trial court, and certainly did not assume or intend to establish any new rule or doctrine with reference to identity of names in cases of jurisdiction by substituted service. There is nothing to indicate any departure from established methods, and there is nothing to indicate that the court did not clearly have in mind the application of the doctrine of *idem sonans.*

As further showing that the majority of the court held that the names in the Lane case were *idem sonans* and based its decision upon that proposition, we refer to the dissenting opinion of Chief Justice Gilfillan, found on page 146. This opinion is brief but pointed and is as follows:

> "I dissent. I think in statutory proceedings to obtain substituted service, service by notice given through a newspaper inserting the name Berlah instead of the true name Beulah, no matter how it occurred, by mistake or otherwise, would vitiate the service. *One name is not idem sonans with the other.*" (Italics ours.)

This dissenting opinion clearly shows that the Chief Justice understood the majority of the court to hold that the names were *idem sonans*, and he

certainly was in position to know the grounds upon which the majority proceeded.

That the Supreme Court of the State of Minnesota did not intend to establish any new rule of decision in the case of Lane *vs.* Innes is indicated by the fact that the prior case of Atwood *vs.* Landis, 22 Minn., 558, which applied the rule of *idem sonans,* in holding that William H. Landis and William A. Landers are not the same, was not overruled or distinguished. This further appears from the fact that the rule of *idem sonans* has been subsequently applied by the Supreme Court of Minnesota to determine the identity of names. See Massillon, etc., Co. *vs.* Holdridge, 68 Minn., 393, where it was held "S. Holdridge and C. S. Holdridge are not the same name, either under the rule of *idem sonans* or otherwise. Presumptively, they are two different persons." The rule is also applied in the case of Stein *vs.* Hanson, 99 Minn., 387, wherein it was held that Hans E. Hanson and Hans E. Hansen are the same within the rule of *idem sonans.*

The case of Puckett *vs.* Hetzer, 82 Kan., 726, cited in the brief of the defendants in error, page 23, is not, it seems to us, a persuasive authority in support of the proposition that names different in spelling are to be held to be the same because of similarity in print. In that case the court said:

> "Where service by publication is undertaken, the notice must state the name of the

> party to be served, and the question is whether the name 'Joseph Remer' appearing in a printed notice of that character looks enough like, *and when pronounced, sounds enough like 'Joseph Renner' to stand for the same person.*" (Italics ours.)

At another point in the opinion the court said:

> "On the whole the difference is so slight and the resemblance so strong, that a case of *idem sonans* in law is made out."

It thus appears that the court in the last analysis arrived at the conclusion that the two names were the same by the application of the rule of *idem sonans*. This is an extreme case, and in our judgment the two names cannot properly be said to sound the same. Certainly it cannot be said that Remer and Renner look alike in print, and if the rule is that by publishing a summons to Joseph Remer the property of Joseph Renner can be taken, then a non-resident land-owner has little protection. See discussion, with respect to service by publication, in Priest *vs.* Board of Trustees, 34 Sup. C't Rep., 443 (decided March 9, 1914).

An examination of the cases cited in the brief of the defendants in error, page 26, seems to indicate that they cannot be of much, if any, assistance in determining the case at bar. We will refer briefly to these cases:

Kinney *vs.* Harrett, 46 Mich., 87-90. This was

an ejectment suit. All the court said as to names was this:

> "There is an objection to a variance in a deed between the names of Kenney and Kinney; but this is immaterial. It is, as they are commonly spoken, *idem sonans.*"

No question of jurisdiction, by publication or otherwise, was involved.

Reading *vs.* Waterman, 46 Mich., 107. The only question involving names in this case was the use of the name "Dixon" instead of "Dickson" in a notice of mortgage foreclosure sale. The mortgage itself, containing the correct name of the mortgagee "Dickson," was referred to in the notice by time and place of record. The court said on the question of name (p. 111):

> "In the present case the body of the notice contained the name of the mortgagor, but the mortgagee was named therein "Dixon" and not "Dickson." These names, however, are the same in sound, and legally identical unless shown to refer to two different persons. Here the name of Mrs. Dixon was referred to as mortgagee and the mortgage itself removed any possibility of error. The name signed to the notice was shifted by some accident to the types, but as the notice showed the foreclosure was on behalf of the original mortgagee, no harm could come from such manifest slip, which could mislead no one."

People *vs.* Gosch, 82 Mich., 22. This was a criminal case. The accused parties were in fact before the court. No question of actual jurisdiction was involved. The only part of the opinion bearing upon the names is as follows:

> "It is also claimed that the warrant was void for the reason that it did not properly name the respondents. In the warrant the first name of Gosch was spelled 'Amel' instead of 'Amiel,' and the name of 'Brearly' was spelled therein 'Brailey.' This claim is scarcely worthy of notice. The names are *idem sonans.*"

Van Benschoten *vs.* Fales, 126 Mich., 176. This was an attachment case, and the trial court held that the misnomer of George V. Cahill for John V. Cahill in an affidavit of attachment could not be cured by amendment. An *alias writ* was issued properly identifying the defendant Cahill, and the Supreme Court held that the *alias writ* was authorized. The mistake in name, therefore, became immaterial.

Ruthe *vs.* Green Bay & Minn. R. Co., 37 Wis., 344. This was also an attachment case. The action was brought in the name of Paul Ruthe, but the affidavit of attachment was signed Paul Ruty. The court stated, in effect, that waiving the question whether the appearance of the defendant did not cure defects in the affidavit, the variance in the names was not jurisdictional, but could be cor-

rected by amendment at any time, and then added, "besides, it is quite probable that 'Ruthe' and 'Ruty' are *idem sonans,* and if so no amendment was or is necessary."

It is apparent that no question of notice or jurisdiction was involved in this case. The parties were all before the court.

We regret that counsel have been led to think that we place overemphasis upon the rule of *idem sonans.* (See brief of the defendants in error, page 12). We disclaim such intention. What we would emphasize very strongly is the importance of names being given correctly in a published summons. Personal service should in all cases be insisted upon if possible. Where substituted service becomes necessary the party to be served has a right to have his name correctly set forth in the published notice. That is what all statutes authorizing service by publication contemplate. That is the general rule and the correct rule, and some courts insist upon its strict observance, as shown by cases cited in our original brief. But we cannot ignore the fact that many courts in such cases have applied the rule of *idem sonans,* in cases of service by publication, where the variance in the names is slight and the names, when pronounced, sound the same. As pointed out in our original brief, this is the extent to which exception to strict accuracy in the spelling of names in published notices has been to any appreciable extent admitted.

On page 14 of their brief counsel make the claim that the omission of the middle initial from the name in the published summons was not material, because, as they assert, the judgment under which the plaintiff in error claims was a lien in the name of Albert Geilfuss, assignee, though entered in the name of Albert B. Geilfuss, assignee. Counsel do not attempt to answer our argument contained in subdivision IV of our original brief, commencing on page 31, to the effect that the judgment became a lien in the name of Albert B. Geilfuss, assignee, who was the party to be served in the partition action. Counsel cite no authorities in support of their statement. At the risk of reputation we refer the court to the findings of the trial court (R., 21), wherein said judgment was found to have been entered in the judgment book and appeared in the judgment roll in the office of the clerk of the district court as in favor of Albert B. Geilfuss, assignee. In the memorandum of the judge attached to the findings it is stated that "the interest of Albert B. Geilfuss, assignee, and the name in which he claimed the same appear of record. *Prima facie,* that was the name under which he should be sued in reference to such interest" (R., 39). The State Supreme Court in its opinion (R., 69) said:

> "The precise question is whether a service by publication on 'Albert Guilfuss, assignee,' gives the court jurisdiction to render a default judgment binding upon 'Albert B. Geilfuss, assignee.' The difference in the name of the defendant served

> and the name of the owner of the judgment liens sought to be affected by the action are the difference between 'Guil' and 'Geil,' *and the omission of the middle initial.*" (Italics ours.)

It thus appears that both the trial court and the Supreme Court considered that Albert B. Geilfuss, assignee, was the party to be served, and the statutes and decisions cited in our brief at the point referred to clearly sustain this position.

Counsel for defendants in erorr are mistaken in the statement made on page 14 of their brief, "that the plaintiff in the partition suit also made 'Albert B. Geilfuss' a defendant and the summons was also served against that name by publication." It is apparent that this erroneous statement of fact was inadvertently made, and what counsel doubtless intended to say was that the name Albert B. Guilfuss (without the addition of the word assignee) was included among the defendants named in the published summons (R., 23 and 24). But this, in our judgment, does not aid the service. There was no judgment in favor of Albert B. Guilfuss, nor was there any judgment in favor of Albert B. Geilfuss, but there were two judgments entered in favor of Albert B. Geilfuss, assignee, and that was the party to be served. Under any test of similarity in print of the different names involved, taken as a whole, as contended for by counsel, there is a most striking difference between Albert B. Geilfuss, assignee, and Albert B. Guilfuss.

Counsel are in error in making the statement on page 11 of their brief that the partition judgment has stood unquestioned for thirteen years. Whether this is so or not has nothing to do with the determination of this case. Because of its immateriality we refer to counsel's statement with reluctance. Though the judgment in the partition action assumed to bar all of the mine claims, the record shows that on the 30th of December, 1901, the interest of John McKinley in the lands involved in the partition action was sold under the execution issued upon the Geilfuss judgment, and the certificate given on said sale was duly recorded (R., 25), and that within one year redemption was made from said sale by the grantor of the plaintiff in error, and the sheriff's certificate of redemption was duly recorded (R., 26). We submit this shows that the assignee of the Geilfuss judgment and those claiming under him questioned, impliedly at least, the validity of the partition judgment and sale to the extent of one-fifth interest in the land by asserting and recording claims inconsistent therewith within a short time after the confirmation of the partition sale, which took place April 28, 1900 (R., 24). The plaintiff in error and his grantor were seemingly satisfied with their title, and it was certainly not incumbent upon them to seek out the defendants in error or others and tender a contest. It is conceded by the pleadings of both parties that all of the lands involved are vacant and unoccupied. The defendants in error necessarily rely

upon the partition judgment and sale to sustain their title to four-fifths interest in the lands, and their attention to the property was necessary to protect that interest. If we may be permitted, we might say that the evidence presented to the trial court showed that the defendants in error, claiming nine-tenths of the property here involved, purchased their interests *after* the sheriff's certificate of execution sale was recorded in the office of the register of deeds, and that the mining lease, under which no ore has been removed, was dated November 8, 1902, which was long after the execution sale of the one-fifth interest claimed by the plaintiff in error and the record of the sheriff's certificate given upon such sale (R., 29).

Respectfully submitted,

FREDERIC D. MCKENNEY,
HENRY J. GRANNIS,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

NO. 838

Henry J. Gaynor,
Plaintiff in Error,
vs.
Robert L. Waterman, et al.,
Defendants in Error.

NO. 839

Henry J. Gaynor,
Plaintiff in Error,
vs.
Robert L. Waterman, et al.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE DEFENDANTS IN ERROR.

ALBERT ARGUS,
THEODORE B. WILSON,
JOHN G. WILLIAMS,
Attorneys for Defendants in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 325.

HENRY J. GRANNIS,

Plaintiff in Error,

—vs—

ALBERT L. ORDEAN, ET AL,

Defendants in Error.

No. 326.

HENRY J. GRANNIS,

Plaintiff in Error,

—vs—

ROBERT B. WHITESIDE, ET AL,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

There is no question as to the facts in this case. The facts are conceded to be as found by the Trial Court in St. Louis County, Minnesota. (See Findings, pages 19 to 30 of Record).

This is an action brought in the District Court for St. Louis County, Minnesota, by Defendants in Error to determine the adverse claim of the Plaintiffs in Error, Henry J. Grannis, et al.

Defendants in error other than the defendant in error Oliver Iron Mining Company claim to be the owners in fee simple of the land described in the complaint (pages 2, 3 and 4 of Record) in the proportions in the complaint set forth, subject to an iron ore mining lease held by the defendant in error Oliver Iron Mining Company, and the plaintiff in error claims to have an interest in said premises adverse to the defendants in error.

On the 8th day of November, 1895, and for some time prior thereto, George A. Elder, Mesaba Land Company, John McKinley and Poca Iron Company were the owners of the land described in the complaint in the following proportions:—George A. Elder, an undivided one-fifth; Mesaba Land Company, an undivided one-fifth; John McKinley, an undivided one-fifth; Poca Iron Company, an undivided two-fifths. (See Findings of Fact of Trial Court at page 19 of Record).

On said date there were docketed in the judgment lien docket in the office of the clerk of the District Court of St. Louis County, Minnesota, a large number of judgments against said John McKinley which were liens upon his undivided one-fifth interest in said real estate. (See Findings of Fact, page 20 of Record). Among such judgments was one docketed January 5th, 1894, for the sum of Two Thousand Eight Hundred Fifty-four and 2-100 ($2854.02) Dollars in favor of

ALBERT GEILFUSS, ASSIGNEE. (See Findings at page 20 of Record). This judgment was entered in the District Court in the name of ALBERT B. GEILFUSS, ASSIGNEE, but was docketed and became a lien in the name of ALBERT GEILFUSS, ASSIGNEE. (See Findings at page 22 of Record). Also one docketed January 10th, 1894, for the sum of Two Thousand One Hundred Twenty-five and 60-100 ($2125.60) Dollars in favor of ALBERT B. GEILFUSS, ASSIGNEE. (See Findings at page 20 of Record). This judgment was entered in the District Court in the name of ALBERT B. GEILFUSS, ASSIGNEE, and docketed in the same name.

On the 8th day of November, 1895, said George A. Elder commenced a partition action in the District Court for St. Louis County, Minnesota, to partition the premises involved herein against the owners of the above described premises and against the judgment lien creditors. (See Findings at pages 21 to 25 of Record).

Throughout said partition proceedings the name GEILFUSS was spelled GUILFUSS, Albert Geilfuss, Assignee, and Albert B. Geilfuss being named as defendants as Albert Guilfuss, Assignee, and Albert B. Guilfuss.

There was no personal service of the summons in said action upon said ALBERT GEILFUSS, ASSIGNEE, nor upon said ALBERT B. GEILFUSS, ASSIGNEE, and neither of them in any manner appeared in said action. (See Findings at page 23 of Record).

The summons in said action was served in the usual way by publication as provided by the statute, and copies thereof were mailed as required by law to said defendants at their places of residence, to-wit: One to *Albert Guilfuss, Assignee Milwaukee, Wisconsin,* one to Albert B. Guilfuss, Milwaukee, Wisconsin. (See Findings at page 23 of Record).

On the 5th day of May, 1899, judgment or decree was entered in said partition action in the usual form ordering a sale of said premises, appointing a referee to make such sale. The referee thereafter made such sale and the same was confirmed by the court, and thereafter the defendants in error became the owners in fee simple by mesne conveyances of such interest in said land as had been acquired by the purchaser under said referee's sale in the proportions stated in the complaint. (See Findings at page 24 of Record).

The Geilfuss judgment against John McKinley docketed January 5th, 1894, for the sum of $2854.02, hereinbefore described, was thereafter assigned to one Timlin and was thereafter assigned by said Timlin to F. L. Buell. An execution was thereafter issued upon said judgment, and the premises involved in this action, together with other land, was sold to said F. L. Buell. On August 15th, 1896, a judgment was entered and docketed in favor of the Wells-Stone Mercantile Company against said John McKinley for the sum of $563.46. That thereafter said judgment was assigned by the Wells-Stone Mercantile Company to one Frank Hicks, and on December 30, 1901, Frank Hicks redeemed the lands involved in

this action from the sale of the same pursuant to said Geilfuss judgment as a creditor having a lien. The claim of Henry J. Grannis to said premises is based upon mesne conveyances of said premises from Frank Hicks. (See sub-division 111 of Findings, pages 25, 26 and 27).

The Trial Court found that by reason of the misspelling of the name GEILFUSS, the court acquired no jurisdiction of the defendants therein, Albert Geilfuss, Assignee, and Albert B. Geilfuss; that defendants in error owned only an undivided four-fifths of said premises, and that plaintiff in error, Henry J. Grannis, owned an undivided one-fifth thereof.

A motion was made for a new trial which was denied; judgment was entered holding that the defendants in error had only an undivided four-fifths interest in said premises, and that the plaintiff in error, Henry J. Grannis, had an undivided one-fifth interest therein, and the defendants in error appealed from that judgment to the Supreme Court of the State of Minnesota, which reversed said judgment and ordered judgment that defendants in error owned the whole of said property, and that plaintiff in error Grannis had no interest therein. (See Ordean v. Grannis, 118 Minn., 117).

That decision and judgment is brought here by writ of error.

ARGUMENT.

I.

AS TO WHETHER THERE IS ANY FEDERAL QUESTION INVOLVED IN THIS CASE.

Is there any federal question to be reviewed by this court in the case at bar? Is there any question of due process of law involved? The statutes of the State of Minnesota providing for substituted service of summons in a civil action was not questioned or complained of in the Supreme Court of Minnesota, and is not questioned or complained of here. Its constitutionality is not challenged, and it is not claimed that it provides for a method of substituted service which is not due process of law within the meaning of the XIV Amendment of the Constitution of the United States.

There was no controversy in this case in either of the State Courts as to the meaning or construction of this state statute. No claim was made in the State Courts, and no claim is made here, that any of the requirements of the statutes of Minnesota providing for such substituted service of the summons or notice was omitted in the action for the partition of the lands involved in this suit. Everything was done in the partition suit that was necessary to be done under the statute in order to acquire jurisdiction by substituted service, including the mailing and publication of the summons. The only thing passed upon by the District Court in St. Louis County, Minnesota, and by the Supreme Court of the State, was the sufficiency as notice of the summons mailed

and published. The only instrument construed and adjudicated upon by either of the State Courts was this summons.

At the time the partition action was brought, the judgment lien docket in the office of the Clerk of the District Court for St. Louis County, Minnesota, showed two judgments which were liens upon the property involved in the partition suit (of which the property involved in this action is a part) i. e., one in favor of *Albert Geilfuss, Assignee,* and one in favor of *Albert B. Geilfuss, Assignee.* The attorneys who brought the partition action made both Albert Geilfuss, Assignee, and Albert B. Geilfuss, Assignee, parties defendant, writing the names, however, as Albert Guilfuss, Assignee, and Albert B. Guilfuss (the designation "Assignee" being omitted as to Albert B. Guilfuss), and the summons was mailed addressed to each of said named defendants at Milwaukee, Wisconsin, and published as to each. The only objection that was made in the State Courts by plaintiff in error, and that can be made here, to said summons as notice, is that in the spelling of the surname, "ui" was used instead of "ei".

The question before the Supreme Court of the State of Minnesota was simply whether or not, taking this summons by its four corners and considering it as a whole, in view of this trivial variance in spelling, it was sufficient to constitute notice to Albert Geilfuss of the pendency of the action. And that is the question which the Supreme Court of Minnesota did decide, and held that such summons was sufficient as notice to

Albert Geilfuss, Assignee, or Albert B. Geilfuss, Assignee. At page 125 of its decision in Vol. 118, Minn. Reports, it says:—

> "The only differences are the absence of the middle initial "B.", and the use of the vowels "ui" in place of "ei". We have reached the conclusion, considering each name as a whole, that the differences between them are trivial, and not such as could possibly *cause defendant, or any one knowing him, to doubt that he was the person intended to be named.*"

The question which occurs here is whether the construction by the State Court of this summons, and its decision as to its effectiveness as notice, is not a matter of common or general law. It involves no construction of any State Statute, United States Statute, Constitution, or Treaty. It is simply a construction or a decision on the meaning of an instrument or writing, and is based upon the principles of common or general law. It would seem that such a question is exclusively for the decision of the courts of the State, involves no federal question, and is not subject to review by this court. We advance this proposition with diffidence for the reason that we have been unable to find any decisions of this court bearing directly upon it. To hold to the contrary would lead, it would seem, to the proposition that every decision by the Supreme Court of any state involving the question of the form, regularity and sufficiency of any summons or notice as notice will be reviewable by this court, no matter how

trivial it may be, and whether or not the service is personal or substituted.

In this connection, the attention of the court is called to the language of this court in the case of Ballard v. Hunter, 204 U. S., 241. At

> "Mixed with the contention is a charge that the notice to non-residents did not comply with the act of 1893, or the general law of the State, but this is decided against plaintiffs in error by the Supreme Court of the State, *and we accept its ruling.*"

See also

Balt. Traction Co. v. Balt. Belt Railroad, 151 U. S., 136.

French v. Taylor, 199 U. S., 274.

Palmer v. McMahon, 133 U. S., 660.

Castillo v. McConnico, 168 U. S., 674.

In the last case above cited, this court, at page 680, in regard to notice in a tax proceeding, says:

> "The decision of the state court *that the advertisement was sufficient* under the Louisiana statute involved purely a state question, which we accept and follow."

This case also distinguishes the case of

Marx v. Hanthorn, 148 U. S., 172.

which is relied upon by the plaintiff in error in this case. It would seem that this case ought to be dismissed because of the lack of a federal question to review.

II.

JURISDICTION BY PUBLICATION.

The question of jurisdiction by publication in actions in rem is merely a question of publicity. The only object of publication is to bring notice to those who are interested in the thing seized or involved. The supreme object of a publication is *to make public the fact that the proceeding pends;* to attract the attention of the defendant, directly or indirectly, by attracting the attention of the public, his neighbors or friends, or others who may know him or that he is interested in the property seized or the "rem." The question of the sufficiency of the notice published to give jurisdiction is a question of the publicity of the proceedings. Was the notice calculated to attract attention to the proceeding on the part of the public? Did it tend to mislead as to the parties to the proceeding? If the defendant saw it would he know that he was the defendant named? Would his friends, neighbors or others knowing him, seeing the notice, know that he was a defendant? Could it reasonably be said or claimed that the defendant, or his friends, would be misled by the notice? The time was when common law courts looked askance at the jurisdiction acquired by publication of notice—looked with suspicion upon this method. That time is passed. The world moves. This method of obtaining jurisdiction in actions in rem has become a part of the web and woof of American court procedure. The thing can always be found. The persons claiming it cannot always be found. This method has become an absolute necessity of our business life. It is not always infallible. The notice does

not always reach the interested parties or claimants, but it generally does unless such claimants are careless or unassertive of their rights. One who has not abandoned his rights and who is caring for his property will seldom fail to get notice. The method of giving notice to non-resident or unknown defendants by publication in actions in rem has been so long in the statutes of the State of Minnesota that it has become, as it were, a part of the common law of the state. This method of acquiring jurisdiction has been emphasized and sanctioned in the proceedings established for registering titles in Minnesota and other states. In these registration proceedings notice is published as to all persons interested in the property seized, known or unknown, and the proceeding is declared to bind the whole world. There is no room or reason for prejudice against this method of acquiring jurisdiction or for narrowness or technicality in considering whether jurisdiction of the defendant has been acquired by it. Where there is a variance in the spelling of the name of the defendant in notice or summons, the question should not be *one of idem sonans alone, or appearance alone*, but broadly speaking, it should be whether taking the printed notice as a whole, there could be *any reasonable doubt in the mind of the defendant*, or of those knowing the defendant and familiar with his name, as to who *the defendant named was*. This partition judgment has stood *unquestioned* for thirteen years.. Relying upon it, the defendants in error purchased, have paid taxes upon and cared for the real estate. The lessee has leased and expended money in exploring and in royalties. There ought not to be any

straining of law or logic in order that it may be held invalid.

The learned counsel for the plaintiff in error over-emphasizes the rule of idem sonans. He seems to think that the rule of idem sonans is an infallible dogma or fetish. It is not an infallible dogma, it is not a fetish, it is not even a law. It is simply a rule of convenience, like a rule of construction, to be used by the court as one of the means of determining whether or not a process or summons is effective to give notice to the party intended. Undoubtedly, the rule of idem sonans arose at a very early day in the development of the common law when notice to the defendant was given orally in or out of court, and the sound of the name was the predominating thing. Today, court process is served by delivering copies and by publication, and the predominating thing is, or ought to be, *the appearance of the name as a whole* in the process. No one has the constitutional right to have his name so spelled in court process as to be idem sonans, but everyone has the constitutional right *to have notice of the proceedings.* The essential thing is notice of the proceedings, and the rule of idem sonans is simply one of the methods adopted by the courts to use in determining whether or not the paper served was effective as notice.

In the case of Stevens v. Stebbins, 3 Scam., 25, the Supreme Court of Illinois recognizes this. Justice Douglas (Stephen A. Douglas) says:—

> *"The rule of idem sonans, when strictly adhered to, is considered too rigid, and has been much relaxed in modern practice."*

Again in the same decision he says:—

> "According to these authorities, it appears that the courts at the present day are not confined to the rigid rule of *idem sonans*, but adopting a more liberal and reasonable one, inquire whether the variance be material or immaterial. If there be a material or substantial variance, it is fatal; otherwise it is not."

III.

THE NAME "ALBERT GUILFUSS, ASSIGNEE," INSTEAD OF "ALBERT GEILFUSS, ASSIGNEE" IN THE SUMMONS AND PROCEEDING WOULD NOT MISLEAD OR CONFUSE.

So far as the claim of the defendants in error is concerned, *the sole question in this case is whether the spelling of the name "Albert Geilfuss, Assignee" in the summons and proceedings "Albert Guilfuss, Assignee" is such a variance as to prevent the court from acquiring jurisdiction in the partition suit.*

The two judgments were entered in the name of "Albert B. Geilfuss, Assignee," but the earlier judgment was docketed, and became a lien upon the property involved herein and in the partition suit, in the name of *"Albert Geilfuss, Assignee."* The plaintiff in the partition suit was only concerned with the judgment as a lien upon the property involved. As a lien upon the property it

was in the name of *"Albert Geilfuss, Assignee."* Clearly the plaintiff in the partition suit was *within his right in bringing the action against "Albert Geilfuss, Assignee."* It follows that there was no error in the proceedings or summons as to the *initial "B"*. It appears from the records of the judgments that "Albert Geilfuss, Assignee" and "Albert B. Geilfuss, Assignee" were one and the same person. Nevertheless, the plaintiff in the partition suit *also made "Albert B. Geilfuss"* a defendant and the summons was also served against that name by publication. For this reason, also, any question as to the *initial letter "B"* in the summons or proceedings *is eliminated*. It follows that the only error in the summons and proceeding is the spelling of the name Geilfuss, Guilfuss. It is inconceivable that any one could have had any doubt that *"Albert Geilfuss, Assignee"* was the person made a defendant upon reading this summons or that *Albert B. Geilfuss was also made a defendant*. How could this variance in the spelling of the name mislead any one or cause any doubt as to who the defendant was? The general appearance of the name is the same. The variance is *trivial* and *unsubstantial*. The defendant himself, seeing the summons, could not doubt that he was the defendant. Those of the public who knew the defendant and were familiar with his name, could not doubt that he was the defendant. The position of defendants in error in this case is squarely sustained by the Supreme Court of Minnesota in the case of

Lane v. Innes, 43 *Minn.*, 137.

At page 143 of that case, the court says:—

"In the published summons in that action there was a clerical mistake in the spelling of plaintiff's name, *caused by the change of a single letter.* Her name was then *Beulah M. Plimpton.* As printed it reads *'Berlah M. Plimpton.'* In the judgment of the trial court this was not *deemed so material a change as to be misleading.* And we think this will be sufficiently apparent when the two names are placed in juxtaposition. *The plaintiff, or any one knowing her, could hardly mistake as to the person intended.* Seaver v. Fitzgerald, 23 Cal., 86, 92, 93; Stevens v. Stebbins, 3 Scam., 25; Belton v. Fischer, 44 Ill., 32; Stewart vs. State, 4 Blackf., 171; Schrooler v. Asherst, 1 Litt., 216, 13 Am. Dec. 233, note; Mallory v. Riggs, 76 Iowa, 748, (39 N. W. Rep., 886.)"

This case has never been overruled or modified and stands as expressive of the law of Minnesota. In the published summons in that case a constituent part of the name was absolutely changed. "Beulah" was printed in the summons "Berlah." Nevertheless the court holds that putting the two names side by side, as a whole, "Beulah M. Plimpton" and "Berlah M. Plimpton," it is not such a change as to be *misleading.*

It says:—

"In the judgment of the trial court, this was not deemed so material a change as to be misleading. And we think this will be sufficiently apparent when the two names are placed in juxtaposition."

With how much stronger reason the principal here enunciated can be applied to the case at bar.

Put the two names, side by side, "Albert Geilfuss, Assignee" and "Albert Guilfuss, Assignee."

The trial court in St. Louis County, in reference to Lane v. Innes, says:—

> "The case was not decided upon an application of the rule of *idem sonans precisely* but upon the underlying principle that the difference between the names was not *substantial,* and that no one knowing the real defendant *would be misled by the name as published,* and it is said that it is apparent on placing the names in juxtaposition." (R. 39).

All of which is a correct statement of the Lane v. Innes case and shows that *it is on all fours with this case.* If the variance in the name in that case was not substantial, how, in all good sense, can it be considered that the variance in the name in this is *substantial?* If no one knowing the real defendant in that case would be *misled by the name as published,* how could anyone, knowing the real defendant in this case, *be misled by the name as published?*

In this case all the trial court claims is that the misspelling of the name changed a long i to a short i. In that case the name was changed absolutely both in appearance and in sound. And yet the court in that case held, and rightly held, that taking the whole name together, *no one could*

have been misled by the variance *as to who was the defendant.* In this case not only is it true that no one could have been misled by the name as published, but the name itself was accompanied by the "descriptio personae" "assignee" which rendered it *impossible* for the defendant, or anyone knowing of his official capacity, to be *misled* by the variance.

In reference to the effect of other descriptive matter used in connection with the name as published, Chief Justice Fuller, in the case of Meyer v. Kuhn, 25 U. S. App., 174, (13 C. C. A., 298, 65 Fed., 705), at page 186, says:—

> "In Iowa and Ohio it has been held that, although the name is incorrectly spelled, *yet if accompanied by other description making the identification clear, notice may be sustained.*"

In this same case the Chief Justice refers to Lane v. Innes above, apparently with approval, saying at page 186:—

> "In Lane v. Innes, 43 Minn., 137, the Supreme Court of Minnesota was of opinion that the name 'Beulah M. Plimpton' was so slightly variant from 'Berlah M. Plimpton' that a mistake in that regard was not material."

And again on the same page quotes with approval as follows:—

> "The office of the notice is in part to give the pendency of the action notoriety. It should be such that *others* than the defend-

> ant, seeing it, and *knowing the defendant, or knowing of him, would not probably be misled by it as to the person for whom it was intended.*"

Lane v. Innes is also cited on this point in Clifford v. Thun, 74 Neb., 831. (104 N. W., 1052).

The trial court in St. Louis County further says of the Lane v. Innes case (R .40):

> "The case seems to have been determined from a consideration of how the two names *appeared to the eye* rather than how they *sounded to the ear*, and the decision was influenced somewhat by reason of the fact that the name was *rather unusual* and therefore even with the *change of a letter* was not likely to be mistaken or misunderstood. Generally speaking, however, the test is, are the names *Idem Sonans.*"

If the name in the case of Lane v. Innes was "*rather unusual*" what can be said of the name in this case with its *unusual, striking* and *distinctive* characteristics aside from the *changed letter?*

The characteristics of this name, aside from the *changed letter, are so marked and pronounced* that it is *impossible* that anyone should have *mistaken or misunderstood it.* It is folly for courts and lawyers to allow the so-called rule of *idem sonans* to run away with them as regards published notices. More emphasis should rightly be placed upon how the published name *appears to the eye* than upon how it sounds to the ear. The name in the notice is *printed, not sounded—read,*

not spoken. Different persons may sound the name differently, *but it is the same to the eye of all.* The decision in the case of Lane v. Innes *is not only good law, but it is good sense,* and it is *decisive of this case.*

IV.

AS TO THE RULE OF IDEM SONANS AND WHETHER IT APPLIES TO THIS CASE.

The trial court in St. Louis County correctly says:—

> "The law, however, *does not strain at trifles,* and will not hold a proceeding wholly void merely because of some *trifling variation from the true name.* The question is, has there been a *substantial variation* from the true name of the defendant. *If there has not, he will be bound.*" (R. 39).

Defendants in error claim that in this case there was no substantial variation in the name—no variation that would even tend to mislead or confuse the defendants or his friends as to who was the defendant—and that the case is controlled by the principle of law laid down as above by the trial court as well as by the case of

Lane v. Innes, 43 Minn. 143 above.

The trial court in St. Louis County does not directly say that the name "Albert Guilfuss, Assignee," is a substantial variance from the name "Albert Geilfuss, Assignee," but by inference so holds.

It says:

> "Geilfuss" is very evidently a German name. As such it must be pronounced with the long sound of "i." Practically all surnames beginning with the letters "Gei" are so pronounced. None is pronounced with the short sound of "i." It happens that there was a Swiss historian of German parentage named "Geilfuss." His name is pronounced with the long "i." On the other hand, the name "Guilfuss" would necessarily be pronounced with the short sound of "i." The syllable "guil" is practically always so pronounced in all kinds of words." (R. 40.)

Here it is claimed that there is a variance in the surname of the defendant in sound from long "i" to short "i." The first name is correct. The second name has one letter changed. And the descriptio personae "assignee" is correct. All that is claimed is that the long "i" in the second name is changed to short "i" in sound. That is claimed to be a substantial variance. Appellants deny that assuming what the court says to be true that it constitutes a substantial variance. Note that the general appearance of the name as a whole is lost sight of and not considered although the general appearance of the name as a whole is the sole and just foundation of the decision in *Lane v. Innes* above.

If the expression may be pardoned, this would look like "*straining at trifles*" in order to find a substantial variance in the name. It is said that

"ei" in Geilfuss must be pronounced like long "i" and then it is said:

> "On the other hand the name "Guilfuss" *would necessarily be pronounced with the short sound of "i."* The syllable *"guil" is practically always so pronounced in all kinds of words."* (R. 41.)

And yet this statement at once falls down over the words "guile," "guide" and "guise." In all these words "ui" is pronounced long "i." Now looking at proper names. Take for instance the name of Gov. Curtiss Guild of Massachusetts, now American Ambassador at St. Petersburg. It is uniformly pronounced with the sound of long "i." This name is of such prominence that this court can take judicial notice of that fact. Here "ui" is sounded long "i" in the combination of letters "guil." The name of the Guild family of Illinois is sounded with the same. Now what does Albert B. Geilfuss of Milwaukee say as to the way Americans sound "ei" in his name. He says:

> "That in addressing affiant and calling his name, many people, and especially Americans, pronounce his surname giving the "ei" therein the short sound of "i," as though it was spelled "Gilfuss." This is most generally true among Americans until they become acquainted with affiant, when they usually adopt the same pronunciation which is used by affiant and his family. Until they become acquainted with him, Americans usually pronounce his name as though it were spelled "Gilfuss." (R. 47.)

It appears from this that Americans sound the "ei" in Geilfuss as short "i" generally.

This shows that the manner of sounding this name among Americans is indefinite. Nothing is so arbitrary and variable as the method of sounding proper names, particularly foreign proper names. Thus it appears that there should be hesitation in concluding that a name is not idem sonans. The whole question is a question of notice, of publicity, of bringing the action to the attention of the person concerned. It is not a question of the absolutely correct academic way of pronouncing the name, but how it appears and how people in general look at it and pronounce it, and how efficient it would be as a medium of notice, i. e. whether it, as published, would mislead or confuse. It is said that Geilfuss is a German name. This, of course, is to be considered, but it must be remembered that the notice was published in *America, not in Germany.* Americans do wonders with foreign names. When a foreign name is put into the "hopper" of American usage almost anything is apt to be ground out. Americans do not speak the German language and are not governed by a German dictionary. A foreign name in America is in an anomalous condition until Americans have remade it or determined how they will pronounce it. If the German Swiss historian mentioned had come to America, he would probably have found that he did not know how to pronounce his own name. However, Americans have not done much to his name, only changed a long "i" to short "i". Take the French name of the writer of this brief, "Jaques." This name

has been shaken around in the American hopper for about one hundred and fifty years. The letter "c" has been shaken out of it and it has had all kinds of monstrous pronunciations. Now a great many people, including the dictionary, have decided that it should be pronounced as if it were spelled "Ja'kwes." Suppose summons were published in which the writer's name was printed "Jakwes." That would be a case where the name would be *idem sonans* but would anyone claim that jurisdiction of the writer could be obtained by such publication? We think not. The name as published would vary so, in appearance, that no one would recognize it as the same name. This shows that the appearance of the name in a published notice is of vastly more importance than the sound, particularly in the case of foreign names, which are generally sounded in different ways by different persons. Also that courts should be slow to hold that a name of foreign origin is or is not *idem sonans* among Americans. In this case not only was the summons as published calculated to give the desired notice, but it actually did. (See affidavits of Geilfuss R. 47 and 48, Timlin R. 49, 50 and 51, Crosby R. 51 and 52.)

Since writing this brief, our attention has been called to the case of Puckett v. Hetzer, 82 Kan., 726, decided June 11th, 1910. This case was not before the Supreme Court of Minnesota at the time of the argument of the case at bar, and has just come to our attention. It touches in its reasoning upon so many of the points and arguments made in this brief that we shall quote it

quite fully. The italics used are ours. The court says:—

> "In April, 1903, F. C. Puckett took judgment by default quieting his title to the land in controversy. Service was obtained by publication. The proceedings, including the notice, gave the defendant's name as Joseph Remer. In July, 1908, A. R. Hetzer obtained a quit-claim deed of the land from Joseph **Renner, and in August following** moved to vacate the judgment as void so far as it affected the interest of his grantor. The motion was denied, and Hetzer appeals.
>
> "The notice only need be considered. If the proper party were duly served other mistakes are inconsequential. Where service by publication is undertaken the notice must state the name of the party to be served, and the question is whether the name Joseph Remer, appearing in a printed notice of that character, *looks enough like*, and when pronounced *sounds enough like*, Joseph Renner to stand for the same person. *Perfect orthography is not required. Perfect identity of sound is not required.* Grant that there is some orothepical standard in existence, pronounciation modeled after it *will vary in different localities, with different individuals in the same locality and with the same person at different times, and practical similarity is all that can be insisted upon.*
>
> "The appellant founds his argument upon *a book rule that 'e' has its long sound when*

it ends an accented syllable. From this he concludes that the name in the notice must be pronounced Re'-mer. The argument fails for these reasons: No law of syllabification is cited which prevents the letter 'm' from forming a part of the first syllable of this proper name. *If there be such a law the court is not bound to obey either it or the cited rule in determining the question propounded, and greater latitude is indulged in the pronunciation of proper names than in any other class of words.* (State Bank v. Kuhnle, 50 Kan., 420). This being true, the appellant is bound to take into account the pronunciation Rem'-er.

"The letters 'm' and 'n' are pronounced with continuous nasal tones, the only difference being in the way the oral passage is obstructed to force the air through the nose. There is much similarity in sound even when pronounced with care, and, leaving out of account all slovenliness, they are frequently confused because of differences in the shape and structure of the organs of speech in different persons, differences in the degree of perfection with which those organs are used, differences in stress and differences in rapidity of enunciation. The doubling of the letter 'n' in Renner has no marked effect on the sound of the word, no more than the doubled 't' in ditty, as compared with city, in ordinary speech. In both Remer and Renner the voice glides from the common vowel 'e' into the nasal tone without any break,

and then passes smoothly to the same final 'er,' thus contributing much to identify. On *the whole the difference is so slight and the resemblance so strong that a case of idem sonans in law is made out.*

"The appellant refers to the decision in Entrekin v. Chambers, 11 Kan., 368, wherein it was held that Brimford and Binford are not *idem sonans.* It is plain, however, that the buzzing 'r' was the principal factor in destroying similarity of sound and not the substitution of 'm' for 'n.' If the two words had been Bimford and Binford, the decision would doubtless have been different.

"Besides what has been said in reference to sound, the appearance of the printed words 'Joseph Remer' was enough like that of Joseph Renner to put a fairly prudent person on guard against a clerical or typographical error."

Attention is also called to Kinney v. Harrett, 46 Mich., 87, in which Kinney and Kenney were held to be idem sonans. Reading v. Waterman, 46 Mich., 107, in which Dixon and Dickson were held to be idem sonans. People v. Gosch, 82 Mich., 31, in which Brearley and Brailey were held to be idem sonans. Ruthe v. Green Bay M. R. Co., 37 Wis., 344, in which Ruty and Ruthe were held to be idem sonans. Van Benschoten v. Fales, 126 Mich., 176.

It would serve no useful purpose to marshall decisions upon supposedly similar cases. These

cases vary with their varying facts. Some of them are excessively technical and some of them give more latitude. They do not seem to be helpful. No general principle seems to underlie them. The Supreme Court of Minnesota in the case of Lane v. Innes, and in the case at bar, seems to have put the matter on the soundest and most just ground, i. e., *the general appearance of the name as a whole.* It is submitted that there was no substantial variance in the name of defendant as published; that the judgment in the partition case was binding upon Geilfuss; that the judgment in the Supreme Court of Minnesota should be sustained, and that judgment should be ordered for the defendants in error adjudging that they are the owners of the whole of the real estate involved as was ordered by the Supreme Court of Minnesota.

ALFRED JAQUES,
THEODORE T. HUDSON,
JOHN G. WILLIAMS,
Attorneys for Defendants in Error.

SUBJECT INDEX.

	Page.
Statement of the case	1
As to whether any federal question	6
Jurisdiction by publication	10
The summons as published would not mislead or confuse	13
As to the rule of idem sonans and whether it applies to this case	19

LIST OF CASES CITED.

Ballard v. Hunter, 204 U. S., 241	9
Balt. Traction Co. v. Balt. Belt Railroad, 151 U. S., 136	9
Belton v. Fischer, 44 Ill., 32	15
Castillo v. McConnico, 168 U. S., 674	9
Clifford v. Thun, 74 Neb. 831 (104 N. W. 1052)	18
Entrekin v. Chambers, 11 Kan., 368	26
French v. Taylor, 199 U. S., 274	9
Kinney v. Harrett, 46 Mich., 87	26
Lane v. Innes, 43 Minn., 137	15, 17, 19
Mallory v. Riggs, 76 Iowa, 748	15
Marx v. Hanthorn, 148 U. S., 172	9
Meyer v. Kuhn, 25 U. S. App., 174, (13 C. C. A. 298, 85 Fed., 705)	17
Ordean v. Grannis, 118 Minn., 117	5
Palmer v. McMahon, 133 U. S., 660	9
People v. Gosch, 82 Mich., 31	26
Puckett v. Hetzer, 82 Kan., 726	23
Reading v. Waterman, 46 Mich., 107	26
Ruthe v. Green Bay, M. R. C., 37 Wis., 344	26
Seaver v. Fitgerald, 23 Cal., 86	15
Schooler v. Asherst, I. Litt., 216, 13 Am., Dec. 233, note	15
State Bank v. Kuhnle, 50 Kan., 420	24
Stevens v. Stebbins, 3 Scam., 25	12, 15
Stewart v. State, 4 Blakf, 171	15
Van Benschoten v. Fales, 126 Mich., 176	26

GRANNIS *v.* ORDEAN.

GRANNIS *v.* WHITESIDE.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Nos. 325, 326. Argued April 27, 28, 1914.—Decided June 8, 1914.

Where the trial court did not infringe any Federal right of plaintiff in error, but the decision of the appellate court ran counter to the alleged Federal right which was raised on petition for reargument and specifically passed on and overruled in refusing the reargument, this court has jurisdiction under § 237, Judicial Code, to review the judgment.

In determining what is due process of law within the meaning of the Fourteenth Amendment, there is a distinction between actions *in personam* and actions *in rem;* in the former judgments without personal service within the State are devoid of validity either within or without the State but in the latter the judgment although based on service by publication may be valid so far as it affects property within the State. *Pennoyer* v. *Neff*, 95 U. S. 714.

Where a State has jurisdiction over the *res* the judgment of the court to which that jurisdiction is confided, in order to be binding with respect to the interest of a non-resident not served with process within the State, must be based upon constructive service by mailing, publication or otherwise in accordance with the law of the State.

This court must exercise an independent judgment as to whether the process sanctioned by the court of last resort of the State constituted due process of law; it is not bound by, nor can it merely accept, the decision of the state court on that question.

While the fundamental requisite of due process of law is the opportunity to be heard, that does not impose an unattainable standard of accuracy; and a defendant served with process either personally, or by publication and mailing, in which his name is misspelled cannot safely ignore it on account of the misnomer.

The general rule in cases of constructive service of process by publication tends to strictness, but even in names due process of law does not require ideal accuracy.

In constructive service of process by publication and mailing where

there has been a misnomer, neither the test of *idem sonans* nor that of substantial similarity in appearance in print is the true one; but whether the summons as published and mailed complies with the law of the State so as to give sufficient constructive notice to the party mis-named.

In this case, *held*, that a summons in an action of foreclosure served by publication and mailing and otherwise in strict compliance with the state statute, did not deprive a defendant of his property without due process of law because his name was misspelled Albert Guilfuss assignee in the various papers instead of correctly, Albert B. Geilfuss assignee.

118 Minnesota, 117, affirmed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of a judgment based on service by publication in which the name of the defendant was misspelled, are stated in the opinion.

Mr. Henry J. Grannis and *Mr. Frederic D. McKenney* for plaintiff in error.

Mr. Alfred Jaques, with whom *Mr. Theodore T. Hudson* and *Mr. John G. Williams* were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

These two cases were heard as one, upon the record in No. 325; it being stipulated that since the cases are identical in their facts, and in the questions raised, except that they pertain to different portions of the land respecting which the controversy arises, the decision in No. 326 shall abide the result in No. 325. We shall, therefore, discuss the record in the latter case, without further mention of No. 326.

On the eighth day of November, 1895, and for some time prior thereto, one John McKinley was the owner of an undivided fifth part of certain lands in the County of St. Louis, in the State of Minnesota. Prior to that

time one Albert B. Geilfuss, Assignee, recovered a judgment for the sum of $2,854.02 against McKinley in the District Court of that County, which was duly entered in the judgment book and appeared in the judgment roll in the name of Albert B. Geilfuss, Assignee, and on the fifth day of January, 1894, was docketed by the clerk of the court as in favor of Albert Geilfuss, Assignee, as judgment creditor and against John McKinley as judgment debtor, and being so docketed became a lien upon McKinley's interest in said lands, and on November 8, 1895, was a lien thereon. Under a sale afterwards made upon an execution issued on this judgment, plaintiff in error claims title to the undivided one-fifth of said lands formerly owned by McKinley, by virtue of certain proceedings and conveyances hereafter mentioned. Albert B. Geilfuss, Assignee, recovered another judgment against McKinley for the sum of $2,125.60, which was duly entered and docketed on January 10, 1894, and became a lien upon the interest of McKinley in the same lands, but plaintiff in error claims no rights thereunder.

On November 8, 1895, one George A. Elder, the owner of an undivided fifth interest in said lands, commenced a partition suit in the District Court of St. Louis County against Mesaba Land Company, John McKinley, and the other owners of the fee, and also against certain other parties having judgment or other liens. The suit was brought under the provisions of Chapter 74, Gen. Stat. Minnesota, and its sole purpose was to partition the lands, or, in case a partition could not be had, then to have them sold and the proceeds of the sale distributed among the parties entitled.

At the time of the partition action, Albert B. Geilfuss, Assignee, resided at Milwaukee, Wisconsin. His correct name, "Albert B. Geilfuss, Assignee," or "Albert Geilfuss, Assignee," did not appear among the names of the defendants in the action, or in the summons or other files

or records therein. "Albert Guilfuss, Assignee" was named as a defendant, and it was alleged in the complaint, and found and determined in the findings and judgment, that he was the owner of the judgment for $2,854.02 against McKinley. "Albert B. Guilfuss" was also named as a defendant, and it was alleged in the complaint and found and determined in the findings and judgment that he was the owner of the judgment for $2,125.60 against McKinley. There was no personal service of the summons in the partition action upon Geilfuss, however named, either as individual or as assignee, and no appearance in his behalf. There was a return by the sheriff of St. Louis County upon the summons to the effect that the defendants "Albert Guilfuss, Assignee," and "Albert B. Guilfuss" could not be found in the county, and an affidavit of one of the attorneys of plaintiff was filed, stating that he believed that the defendants "Albert Guilfuss, Assignee," and "Albert B. Guilfuss" were not residents of the State of Minnesota, and could not be found therein, and that after the commencement of the action affiant had deposited copies of the summons in the post-office with postage prepaid, directed to each of these defendants at their respective places of residence, to wit, one to Albert Guilfuss, Assignee, Milwaukee, Wisconsin, and one to Albert B. Guilfuss, Milwaukee, Wisconsin, and stating that the subject of said partition action was certain real property situated in the County of St. Louis and State of Minnesota, and that each of said defendants had and claimed a lien and interest in said real estate, and that the relief demanded in said action consisted in excluding the defendants and each of them from any interest or lien therein. There was also service of the summons by publication upon the defendants named therein as "Albert Guilfuss, Assignee," and "Albert B. Guilfuss," the summons being published in a legal newspaper in Duluth, which is in St. Louis County, Minnesota. It is admitted

that (saving the effect of the misnomer), the statutory provisions respecting the service of summons upon non-residents by mailing and publication were complied with. These are contained in Minnesota Statutes 1894, §§ 5204 and 5205 (respecting civil actions), and in §§ 5771 and 5773 (respecting actions for partition of real property).[1]

---

[1] CHAPTER 66.

CIVIL ACTIONS.

* * * * * * * *

Section 5204. Service by publication, when allowed.

When the defendant cannot be found within the State, of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is *prima facie* evidence, and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the State, or cannot be found therein, and that he has deposited a copy of the summons in the postoffice, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons by the plaintiff or his attorney in either of the following cases:

* * * * * * * *

Fifth. When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein. . . .

Section 5205. Publication, how made.

The publication shall be made in a newspaper printed and published in the county where the action is brought, (and if there is no such newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county, then in a newspaper printed and published at the capital of the state,) once in each week for six consecutive weeks; and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid.

* * * * * * * *

All of the defendants in the action were properly served with summons, except as mentioned, and in due course a judgment was entered on May 5, 1899, adjudging and decreeing the ownership of the lands, and that they could not be divided and partitioned, and ordering that they be sold by a referee to the highest bidder and the proceeds distributed among the defendants according to their respective rights under the law. The sale was made accordingly and confirmed by the court, and thereafter the present defendants in error, by mesne conveyances, acquired such interest in the lands as had been acquired by the purchaser under the referee's sale.

Subsequently the Geilfuss judgment against McKinley, docketed January 5, 1894, for the sum of $2,854.02, was assigned to one Timlin and by him to one Buell, and whatever interest in the land, if any, remained in McKinley after the partition sale was sold under execution and purchased by Buell, and subsequently acquired through mesne conveyances by the present plaintiff in error.

This action (No. 325) was brought by defendants in error to determine the adverse claims in the lands. The trial resulted in a judgment to the effect that the plaintiffs

---

CHAPTER 74.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

* * * * * * * *

Section 5771. Summons, to whom addressed.

The summons shall be addressed by name to all the owners and lienholders who are known, and generally to all persons unknown, having or claiming an interest in the property.

* * * * * * * *

Section 5773. Rules as to civil actions applicable.

Such action shall be governed by the rules and provisions applicable to civil actions, including the right of appeal, except that, when service of the summons is made by publication, it shall be accompanied by a brief description of the property sought to be divided, and except as herein otherwise expressly provided.

were the owners of an undivided four-fifths interest, and that the present plaintiff in error was the owner of the undivided fifth interest which had been the property of McKinley. Upon appeal, the Supreme Court reversed the judgment so far as it adjudged plaintiff in error to be the owner of McKinley's interest. 118 Minnesota, 117. By the present writ of error we are called upon to determine whether the Supreme Court of Minnesota, by its judgment giving effect to the decree in the partition suit notwithstanding the misnomer of Albert B. Geilfuss, Assignee, in the proceedings and summons, has deprived plaintiff in error of his property without due process of law, contrary to the Fourteenth Amendment.

The trial court held that no jurisdiction was acquired in the partition suit over the judgment lien of Albert B. Geilfuss, Assignee, and the Supreme Court declared that if this were correct the lien of his judgment upon the McKinley interest was not affected by the decree in that action, and that the subsequent sale of that interest under execution on the judgment gave a good title to the purchaser, under whom defendant (now plaintiff in error) claims; while on the other hand, if the court acquired jurisdiction over that judgment lien, the McKinley interest in the lands passed to the purchaser at the partition sale, and afterwards became the property of plaintiffs (now defendants in error). This was upon the assumption that the court had jurisdiction to decree a sale in the partition action, a question of state law arising out of facts not here pertinent, and to which an affirmative answer was given in the same opinion.

The precise question now presented, therefore, is whether, under the circumstances, a service by the publication and mailing of a summons in the partition suit, naming as party and addressee "Albert Guilfuss, Assignee," and "Albert B. Guilfuss," constituted due process of law conferring jurisdiction to render a judgment binding

upon Albert B. Geilfuss, Assignee, with respect to his lien upon or interest in the land, he not having appeared.

There is a motion to dismiss, upon the ground that the Federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the Supreme Court of the State, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the Supreme Court upholding the notice that first ran counter to the alleged Federal right. In a petition for reargument, filed by the now plaintiff in error, it was suggested that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the Fourteenth Amendment. The Supreme Court entertained the petition, considered and overruled the contention that petitioner's rights under the Amendment were infringed, declared that its decision was to be interpreted as holding against the contention, and therefore refused a reargument. This is sufficient to confer jurisdiction upon this court. *Mallett* v. *North Carolina*, 181 U. S. 589, 592; *Leigh* v. *Green*, 193 U. S. 79, 85; *McKay* v. *Kalyton*, 204 U. S. 458, 463; *Sullivan* v. *Texas*, 207 U. S. 416, 422; *Kentucky Union Co.* v. *Commonwealth of Kentucky*, 219 U. S. 140, 158.

We therefore proceed to the merits.

In determining what is due process of law within the meaning of the Fourteenth Amendment, a distinction is to be observed between actions *in personam* and actions *in rem*, or *quasi in rem*. In *Pennoyer* v. *Neff*, 95 U. S. 714, 733, it was held that by force of the Amendment a judgment rendered by a state court in an action *in personam* against a non-resident served by publication of summons, but upon whom no personal service of process within the

State was made, and who did not appear to the action, was devoid of any validity either within or without the territory of the State in which the judgment was rendered; it being, however, conceded that a different rule obtains where, in connection with initial process against a person, property in the State is brought under the control of the court and subjected to its disposition, or where the judgment is sought as a means to reach such property or affect some interest in it; in other words, where the action is in the nature of a proceding *in rem*. As was said by the court (speaking by Mr. Justice Field, p. 734): "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

But it is also settled that where a State has jurisdiction over a *res*—as of course it has over the partition of lands lying within its borders—the judgment of the court to which that jurisdiction is confided, in order to be binding with respect to the interest of a non-resident who is not served with process within the State, must be based upon constructive notice given by publication, mailing, or otherwise, substantially in the manner prescribed by the law of the State. *Cheely* v. *Clayton*, 110 U. S. 701, 705; *Guaranty Trust Co.* v. *Green Cove Railroad*, 139 U. S. 137, 148; *Windsor* v. *McVeigh*, 93 U. S. 274, 283; *Hassall* v. *Wilcox*, 130 U. S. 493, 504; *Thompson* v. *Thompson*, 226 U. S. 551, 562.

In the case before us, there is no disputed question as to what steps were taken in order to give notice to Geilfuss of the partition suit. The Supreme Court of the State, in accepting what was done as being a sufficient compliance with the provisions of the statute, in effect construed the statute as permitting such notice to be given as was in fact given.

But, the question whether the process thus sanctioned by the court of last resort of the State constitutes due process of law within the meaning of the Fourteenth Amendment being properly presented to this court for decision, we must exercise an independent judgment upon it. *Scott* v. *McNeal*, 154 U. S. 34, 45; *Ballard* v. *Hunter*, 204 U. S. 241, 260; *Jacob* v. *Roberts*, 223 U. S. 261.

The fundamental requisite of due process of law is the opportunity to be heard. *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436. And it is to this end, of course, that summons or equivalent notice is employed. But the inherent authority of the States over the titles to lands within their respective borders carries with it, of necessity, the jurisdiction to determine rights and interests claimed therein by persons resident beyond the territorial limits of the State, and upon whom the ordinary judicial process cannot be served. The logical result is that a State, through its courts, may proceed to judgment respecting the ownership of lands within its limits, upon constructive notice to the parties concerned who reside beyond the reach of process. That this constitutes "due process" within the meaning of the Fourteenth Amendment was recognized in *Pennoyer* v. *Neff*, *supra*, and is no longer open to question. *Huling* v. *Kaw Valley Railway*, 130 U. S. 559, 563; *Arndt* v. *Griggs*, 134 U. S. 316, 320 *et seq.*; *Lynch* v. *Murphy*, 161 U. S. 247, 251; *Roller* v. *Holly*, 176 U. S. 398, 403. It is not disputed that the statutory scheme of publication and mailing, as established in

Minnesota, for giving notice to non-resident defendants in actions *quasi in rem*, is in its general application sufficient to comply with the Fourteenth Amendment. But the statute provides that "the summons shall be addressed by name to all the owners and lien holders who are known"; and the contention is that the mistake of name in the present instance was fatal.

The "due process of law" clause, however, does not impose an unattainable standard of accuracy. If a defendant within the jurisdiction is served personally with process in which his name is misspelled, he cannot safely ignore it on account of the misnomer. The rule, established by an abundant weight of authority, is, that if a person is sued by a wrong name, and he fails to appear and plead the misnomer in abatement, the judgment binds him. *Lafayette Ins. Co.* v. *French*, 18 How. 404, 409; *Crawford* v. *Satchwell*, 2 Strange, 1218; *Oakley* v. *Giles*, 3 East, 167; *Smith* v. *Patten*, 6 Taunt. 115; *S. C.*, 1 Marsh. 474; *Smith* v. *Bowker*, 1 Massachusetts, 76, 79; *Root* v. *Fellowes*, 6 Cush. 29; *First Nat'l Bank* v. *Jaggers*, 31 Maryland, 38, 47; *S. C.*, 100 Am. Dec. 53, 54; *McGaughey* v. *Woods*, 106 Indiana, 380; *Vogel* v. *Brown Township*, 112 Indiana, 299; *S. C.*, 2 Am. St. Rep. 187; *Lindsey* v. *Delano*, 78 Iowa, 350, 354; *Hoffield* v. *Board of Education*, 33 Kansas, 644, 648.

Of course, in a published notice or summons, intended to reach absent or non-resident defendants, where the name is a principal means of identifying the person concerned, somewhat different considerations obtain. The general rule, in cases of constructive service of process by publication, tends to strictness. *Galpin* v. *Page*, 18 Wall. 350, 369, 373; *Priest* v. *Las Vegas*, 232 U. S. 604. But, even in names, "due process of law" does not require ideal accuracy. In the spelling and pronunciation of proper names there are no generally accepted standards; and the well-established doctrine of *idem sonans*—generally ap-

plied, as it is, to constructive notice of suits—is a recognition of this.

The trial court was of the opinion that the question turned upon whether "Guilfuss" and "Geilfuss" were *idem sonans*, and held that since "Geilfuss" is evidently a German name the first syllable must be pronounced with the long sound of "i," while the first syllable of "Guilfuss" would necessarily be pronounced with the short sound of "i." The court therefore concluded that the names were not *idem sonans*, and that the difference was fatal. The Supreme Court agreed that "Geilfuss" and "Guilfuss" were not *idem sonans*, but held that this was not the proper test; that where a summons is served by publication, the true test is not whether the names sound the same to the ear when pronounced, but whether they look substantially the same in print (following *Lane* v. *Innes*, 43 Minnesota, 137, 143; *D'Autremont* v. *Anderson Iron Co.*, 104 Minnesota, 165); and assuming that the name of the judgment creditor of McKinley was Albert B. Geilfuss, Assignee, the court said: "The question then is, placing the names 'Albert Guilfuss, Assignee,' and 'Albert B. Geilfuss, Assignee,' in juxtaposition, was there so material a change as to be misleading?" This was answered in the negative.

Were we to theorize, we might say that while each of these tests is helpful, neither is altogether acceptable if perfect accuracy were the aim; not the test of *idem sonans*, because it does not appear that all persons would necessarily pronounce Geilfuss with the long "i," or Guilfuss with the short "i"; and not the test of the appearance of the names as printed and placed in juxtaposition, because in fact, as the name appeared in the summons published and mailed, it was "Guilfuss" alone, without any name in juxtaposition to serve as a standard for comparison. And we think both tests are inadequate if applied without regard to what was contained in the summons besides the mere name and addition—"Albert Guilfuss, As-

signee." The record, as it happens, contains no copy of the summons; but from findings and admissions that are in the record, we know that it was in due form, and therefore that it contained such notice of the commencement of the action and of its purpose, and such warning to appear and answer, as would constitute due process of law if served upon a defendant within the jurisdiction (Minnesota Stats., 1894, §§ 5194, 5195); and that it contained, *inter alia*, a brief description of the property sought to be divided (Minnesota Stats., 1894, § 5773, marginal note, *supra*). The underlying question is a practical one—whether, notwithstanding the misnomer, the summons as published and mailed, being otherwise unexceptionable, constitutes a substantial compliance with the Minnesota statute and sufficient constructive notice to the party concerned. In determining this, we need not confine ourselves to the test of *idem sonans*, nor to the appearance of the name in print, but may employ both of these, with such additional tests as may be available in view of what is disclosed by the record. One such additional test, we think, is whether, when two letters reached the postoffice at Milwaukee, one addressed "Albert Guilfuss, Assignee," the other addressed "Albert B. Guilfuss," they or either of them would, in reasonable probability, be delivered to Albert B. Geilfuss, then a resident of that city. Another is, whether, assuming that the summons as so mailed, or as published in Duluth, and containing the misspelled names or either of them, had come to the eye of the veritable Albert B. Geilfuss, or of any person knowing him by that name and sufficiently interested in him to acquaint him with its contents if apprised that it was intended for him, the summons, as a whole, would probably have conveyed notice that Albert B. Geilfuss was the person intended to be summoned. Both of these questions are, we think, to be answered in the affirmative. In view of the well-known skill of postal officials and employés

in making proper delivery of letters defectively addressed, we think the presumption is clear and strong that the letters would reach—indeed, that they did reach—the true Albert B. Geilfuss in Milwaukee. And it seems to us that any person knowing him, and knowing the correct spelling of his name, and having reason to acquaint him with the contents of a notice of this character if supposed to be intended for him, would probably realize for whom such notice was intended, notwithstanding the name was spelled "Guilfuss." The general resemblance between the names is striking, however they are to be pronounced. And the designation, "Assignee," was an additional means of identification. That Geilfuss himself, upon receiving the notice, would be sufficiently warned that it affected his interest in the Minnesota lands under his judgments against McKinley, is free from doubt. He would of course observe the misnomer; but, having received the notice which it was the purpose of the law to convey to him, he could not safely ignore it on the ground of the mistake in the name, any more than, if personally served with summons within the State of Minnesota, he could have ignored it on account of a similar misnomer.

We conclude that there was due process of law in the partition suit, and that therefore the present judgment should be affirmed.

Judgments in Nos. 325 and 326 affirmed.